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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RED ROCK COMMODITIES, LTD. AND
RED ROCK HOLDINGS, LTD.,
Petitioners,

v.

ABN-AMRO BANK, N.A.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does an American corporation, incorporated in Delaware with principal place of business and assets in New York [Red Rock Commodities, Ltd.], which contracts with a New York bank [ABN AMRO, N.A.] in New York that the parties' disputes shall be governed by New York law and may be resolved in either the United States District Court for the Southern District of New York or in the Supreme Court of the State of New York for the County of New York, and which irrevocably submits to jurisdiction in New York for resolution of such disputes, have a claim against the New York bank for evading litigation in New York courts by invoking Israeli court procedure and law to liquidate the American corporation, when the bank knows that the American corporation is not subject to jurisdiction in Israel?

2. Does an American corporation [Red Rock Holdings, Ltd.] incorporated in Delaware with principal place of business and assets in New York, that is not indebted to a New York bank [ABN-AMRO, N.A.], have a claim against the bank for wrongfully liquidating the American corporation in an action commenced in Israel (where there is no personal jurisdiction over the American corporation) based upon the false claim that the American corporation is indebted to the bank?

LIST OF PARTIES

The only parties to this action are listed in the caption. There are no parent companies or subsidiaries of either plaintiff.

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OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Second Circuit dated August 21, 1996 is reported at 1996 WL 473946 (Appendix A, pp. 1a-3a). The opinion of the United States District Court for the Southern District of New York dated December 5, 1995 is reported at 1995 WL 71439 (Appendix B, pp. 4a-15a).

JURISDICTION

The Court of Appeals order appealed from was entered on August 21, 1996 (Appendix B, pp. 4a-15a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fed. R. Civ. P. 12(b)(6)

> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before a pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party may assert at the trial any defense in law or tact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as

provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 15(a)

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

STATEMENT OF THE CASE

This case involves the wrongful liquidation in Israel of plaintiffs Red Rock Commodities, Ltd. ("Commodities") and Red Rock Holdings, Ltd. ("Holdings"), each Delaware corporations with assets and offices in New York, by the New York arm of a Dutch Bank, defendant ABN-AMRO, N.A. ("ABN").

Commodities and Holdings' Second Amended Complaint (Appendix C, pp. 16a, *et seq.*) alleged claims against ABN arising from ABN's failure to follow the terms of the loan agreements between Commodities and ABN, which provided for New York law to govern the parties' transaction and for litigation of the parties' disputes either in the United States District Court for the Southern District of New York or in the New York State Supreme Court located in New York County.

The loan documents provide that New York law governs the parties' transaction and contain a forum selection

clause at Paragraph XII of the Terms and Conditions agreement (Appendix C, p. 54a). That clause reads in full:

> XII. This agreement shall become effective upon being executed by the undersigned and it and the rights and obligations of the Bank and of the undersigned hereunder shall be governed by and construed in accordance with the laws of the State of New York. Any suit, action or proceeding against the undersigned with respect to this agreement may be brought in the Supreme Court of the State of New York, County of New York or in the United States District Court for the Southern District of New York and the undersigned hereby irrevocably submits to the jurisdiction of such courts for the purposes of any such suit, action or proceeding and consents to the service of process in any such suit, action or proceeding by personal delivery or by the mailing thereof by the Bank by registered or certified mail, return receipt requested, postage prepaid, to the address specified in the records of the Bank, such service of process by mail to be deemed effective on the fifth day following such mailing. The undersigned agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in any manner provided by law.

The District Court improperly construed the parties' loan documents to permit ABN, which had not given Commodities any notice of default, had not made any demand upon Commodities to substitute collateral or to repay the loan (all of which are required by its loan documents), to allege in Israeli receivership and liquidation proceedings that it was entitled to receive repayment of the full amount of its loan from Commodities and Holdings.

The District Court permitted ABN to institute proceedings in Israel, rather than in New York as specified in the loan documents, permitted ABN to litigate its rights against Commodities pursuant to Israel law, rather than

New York law which the loan documents provided was controlling, and permitted ABN's Israeli liquidator (who was ABN's counsel) to sell Commodities' and Holdings' assets worldwide in repayment of its loan.

As a result of the District Court's decision, ABN remains unaccountable for its wrongful institution of liquidation proceedings in Israel against both Commodities and Holdings. ABN is unaccountable for its false claims before the Israeli court that Holdings was indebted to ABN and that the Bank's documentation supported such a debt. Holdings was never indebted to ABN and never guaranteed Commodities' loan from ABN. ABN knew that no such debt existed and that there were no bank documents to support such purported debt. By misleading the Israeli court, in a proceeding where Holdings was not subject to the court's personal jurisdiction, ABN was able under Israeli law to make Holdings responsible for the $10 million loan that ABN made to Commodities and proceeded to have its counsel sell off Holdings' assets in satisfaction of such debt.

All of these decisions were made by the District Court on a motion to dismiss Commodities' and Holdings' complaint for failure to state a claim, without having the benefit of discovery of any kind, where all facts and interences are to be construed in plaintiffs' favor.

REASONS FOR GRANTING THE WRIT

I. THE FOURTEENTH AMENDMENT AND PUBLIC POLICY WARRANT APPLICATION OF NEW YORK LAW TO RESOLUTION OF ABN, COMMODITIES AND HOLDINGS' DISPUTE.

The Fourteenth Amendment guarantees to all litigants the right to procedural due process of law. Procedural due process includes the right of an American corporation to be free from domestic application of foreign judgments or proceedings, when such proceedings are commenced in a foreign court that does not have personal jurisdiction

over the American corporation. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 40 L.Ed. 95, 16 S.CL. 139 (1895); *Kulko v. Superior Court of California*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978); and *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

When an American entity is damaged by another's wrongful application of foreign law to liquidate the American entity, the American entity should be able to obtain redress for this wrongdoing. Here, Commodities and Holdings alleged that ABN made untrue statements to the Israeli courts to encourage them to assert jurisdiction over Commodities and Holdings, and to liquidate those companies' assets in Israel and throughout the world.

The District Court and the Second Circuit did not enforce Commodities' and Holdings' rights against ABN for such wrongful conduct, and instead assumed contrary to the allegations of the complaint that ABN was allowed to choose any forum around the world to litigate its claims with Commodities and Holdings, even a forum without jurisdiction over those entities, and that the foreign court acted properly in liquidating the two corporations.

No analysis was made by the District Court or by the Court of Appeals (and none could have been made since the action was at the pleading stage) to determine whether the Israel court had the requisite minimum contacts with Commodities or with Holdings so as to assert plenary jurisdiction over those entities and liquidate all of their assets. Instead, the lower courts blindly extended comity to the Israeli courts' actions by refusing to find that Commodities or Holdings had asserted a valid claim against ABN for wrongful use of the Israeli court to liquidate the two American companies.

What was evident was that ABN proceeded to litigate its dispute in Israel, rather than in New York, because

Israeli courts are extremely favorable to banks and apply Israeli law, rather than New York law, when liquidating a corporation. Commodities and Holdings believe that it was manifestly unfair that ABN be permitted to do so, without review of its conduct under domestic law.

Israel had no stake in the dispute between ABN and Commodities, because both were American corporations having principal places of business and assets in New York. Furthermore, the loan documents specified that New York law was to be applied, and that Commodities and Holdings irrevocably agreed to submit to jurisdiction in the two New York forums where the parties had a reasonable expectation of litigating any disputes.

When looking at the relationship among the parties—ABN, Commodities and Holdings, the forum—Israel—and the litigation, it is clear that procedural due process was not followed by ABN traveling around the globe to liquidate two American entities in a friendly foreign forum, based upon a purported default of a New York loan agreement. See *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977); *Rush v. Savchuk*, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980).

Holdings was especially harmed by ABN's conduct in this regard. As this court noted in *Shaffer* and in *Rush, supra*, at 444 U.S. 328, 100 S.Ct. 577, "[t]he mere presence of property in a State does not establish a sufficient relationship between the owner of the property and the State to support the exercise of jurisdiction over an unrelated cause of action".

American corporations should not be hauled into courts that do not have jurisdiction over them and are located one-half way across the globe, just because the foreign court and foreign law will be favorable to an adversary, and be left without redress, when use of the foreign forum and law is contrary to the American corporation's agreement. Further, if foreign courts, otherwise without juris-

diction over American entities, assume such power, the business affairs of American corporations will be in jeopardy and such wrongful assumption of power will wreak havoc upon our nation's economic and social fabric, not to mention the chaos that will result in our court system. *Cunard Steamship Company Limited v. Salen Reefer Services AB*, 773 F.2d 452 (2d Cir. 1985).

II. THE DISTRICT AND SECOND CIRCUIT COURTS ERRED IN FINDING THAT AS A MATTER OF LAW NEITHER COMMODITIES NOR HOLDINGS COULD ASSERT ANY CLAIM AGAINST ABN FOR ITS BREACH OF THE LOAN DOCUMENTS.

The District Court's dismissal of the Second Amended Complaint amounted to a finding, as a matter of law, that ABN's conduct against Commodities and Holdings, taken at a time when Commodities had fully performed its obligations pursuant to the loan documents, did not constitute a breach of the express or implied terms of the loan documents.

The District and Second Circuit Courts permitted ABN to escape any responsibility for its wrongful use of Israeli law to obtain an order from an Israeli Court resulting in the worldwide liquidation of Holdings, an American entity over which the Israeli Courts had no personal jurisdiction, and one which was not in debt to ABN.

A. Legal Standard for Rule 12(b)(6) Motion.

The District Court noted the appropriate legal standard to follow when deciding a Rule 12(b)(6) motion, that all factual allegations contained in the complaint are presumed to be true and that all reasonable inferences are to be drawn in favor of the non-moving party (citing, at Appendix B, p. 6a, *Paulemon v. Tobin*, 30 F.3d 307, 308 (2d Cir. 1994), *Cohen v. Koenig*, 25 F.3d 1168, 1172 (2d Cir. 1994) and *Allen v. Westpoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991)). The District Court

also properly noted that the complaint should be dismissed only where "the plaintiffs can prove no set of facts in support of [the] claim which would entitle them to relief." (Citing *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

However, the analysis in the Decision and Order shows that the District Court acted contrary to these rules.

B. The District Court Did Not Accept the Facts Pleaded as True and Drew All Inferences in Favor of ABN.

For example, ABN's precipitous actions in August 1992 could only have been based upon an alleged right to proceed against the collateral that Commodities had pledged as security for ABN's loan. However, since New York law governed the parties' loan transaction, the loan was not due until 1995, no demand for repayment was made, and there was no default under the parties' loan documents, ABN had no right to proceed against the collateral (or Ram, which had taken possession of it) pursuant to New York law. As a result, Commodities had a right to damages for breach of contract and pursuant to § 9-507 of the Uniform Commercial Code.

The District Court ignored the substantive law problems which negated any basis for ABN to proceed against Commodities' collateral, and excused ABN's assertion of improper claims in the Israeli proceedings by finding, at Appendix B, pp. 8a-9a, "ABN was presumably acting in its own interest when it opposed Plaintiff's appointment as liquidator." The District Court permitted such action by presuming, incorrectly, that a default had occurred (see Decision and Order, Appendix B, p. 10a, "upon default . . . "[t]he Bank shall be entitled to the immediate possession of the Collateral" and may "exercise any and all of the rights and remedies provided by . . . the Terms and Conditions . . . .) The complaint repeatedly states that no default had occurred.

The District Court also excused ABN's effort to evade its New York law obligations by assuming and stating that ABN's rights in the Ram, Commodities and Holdings liquidation actions were not controlled by substantive law, but were merely procedural matters not governed by the parties' contractual choice of law provision. "Foreclosure and liquidation actions are inherently procedural and therefore are not governed by the contractual choice of law provision." (Decision and Order, Appendix B, p. 10a).

The District Court's ruling permitted ABN to evade its obligations under the loan documents and New York's Uniform Commercial Code by instituting claims in Israel, which has no jurisdiction over the parties, rather than in New York courts which the parties agreed would be the forum for disputes under the loan documents, and by basing its claims against Ram, Commodities and Holdings upon Israeli law, rather than New York law as the parties had agreed. Each of these actions was a breach of the loan documents, entitling Commodities to recover its losses from ABN.

C. The District Court Erred in Finding That the Agreement Allowed ABN to Litigate Disputes Under the Loan Documents Anywhere in the World.

For ABN to move against Commodities' collateral in advance of any default in its loan, it first had to locate a jurisdiction whose laws were extremely favorable towards banks: in our case, Israel. The District Court condoned this forum shopping and determined that ABN was not precluded from litigating its rights to the collateral in any forum in the world, no matter if jurisdiction existed or not, by finding that the parties' loan agreement contained a permissive, rather than mandatory, choice of forum clause.

In so finding, the District Court made a number of serious errors. First, the District Court misread the forum

selection clause (paragraph XII of the Terms and Conditions, printed above) to expressly permit ABN to commence actions against the borrower "in New York *or elsewhere*" (Emphasis by the District Court, see Decision and Order, Appendix B, p. 10a). Second, the District Court ignored that portion of the forum selection clause in which Commodities agreed that it "irrevocably submits to the jurisdiction of such courts for the purpose of any such suit, action or proceeding" and ignored other portions of the loan documents that made New York law controlling.

The District Court relied upon *John Boutari and Sons, Wines and Spirits, S.A. v. Attiki Importers & Distribs., Inc.*, 22 F.3d 51, 53 (2d Cir. 1994), which quoted Judge Weinfeld's decision in *City of N.Y. v. Pullman, Inc.*, 477 F. Supp. 438, 442 at n.11 (S.D.N.Y.) (an agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere unless it contains specific language of exclusion).

Boutari is distinguishable from our case in a number of respects. First, the language of the *Boutari* clause was different from that in our case. In *Boutari*, the jurisdiction clause merely granted substantive jurisdiction to Greek Courts, *which already had jurisdiction over at least one of the parties*, providing "Any dispute arising between the parties hereunder shall come within the jurisdiction of the competent Greek Courts, specifically of the Thessaloniki Courts."

In our case, however, the forum clause specifically designated either of two courts (the Supreme Court, New York County, and the United States District Court for the Southern District of New York) as the venue in which to prosecute any action with respect to the loan documents; in addition, it contained the agreement to "*irrevocably submit*[*s*] *to the jurisdiction of such courts for the purpose of any such suit, action or proceeding.*" (Emphasis added.) The explicit and irrevocable agreement to

submit to personal jurisdiction of those courts evidences the parties' intent that the forum selection clause was mandatory and not permissive.

The general rule is that contractual forum selection clauses are to be enforced. See *Bense v. Interstate Battery System of America,* 683 F.2d 718, 721 (2d Cir. 1982). The Second Circuit ignored its precedent in our case, and improperly held that a party to a contract that does not contain a mandatory forum selection clause may litigate its contractual disputes with the other contracting parties in a non-enumerated forum, even when such non-enumerated forum does not have personal jurisdiction over any of the contracting parties.

This result is contrary to this Court's holding in *M/S Bremen v. Zapata off-Shore Company,* 407 U.S. 1, at 13-14, 92 S.Ct. 1907, at 1915, 32 L. Ed.2d 513 (1972), and to the holdings in almost every other Circuit that contractual forum selection clauses are *prima facie* valid and should be enforced. See, e.g., *Royal Bed & Spring Co. v. Famoussul Industria,* 906 F.2d 45, 49 (1st Cir. 1990); *Foster v. Chesapeake Ins.,* 933 F.2d 1207, 1219 (3rd Cir. 1991); *Mercury Coal & Coke v. Mannesmann Pipe and Steel,* 696 F.2d 315, 317 (4th Cir. 1982); *Sembawang Shipyard, Ltd. v. Charger, Inc.,* 955 F.2d 983, 986 (5th Cir. 1992); *Moses v. Business Card Exp. Inc.,* 929 F.2d 1131, 1137 (6th Cir. 1991); *Bonny v. Society of Lloyds,* 3 F.3d 156, 159-160 (7th Cir. 1993); *Sun World Lines v. March Shipping Corp.,* 801 F.2d 1066, 1067 (8th Cir. 1986); *Spradlin v. Lear Siegler Management Services,* 926 F.2d 865, 867 (9th Cir. (1991); *Riley v. Kingsley Underwriting Agencies, Ltd.,* 969 F.2d 953, 957 (10th Cir. 1992); *Stewart Organization, Inc. v. Ricoh Corp.,* 810 F.2d 1066, 1068-69 (11th Cir. 1987).

Judge Lasker, in *Cambridge Nutrition A.G. v. Fotheringham,* 840 F. Supp. 299 (S.D.N.Y. 1994), determined that such language supports the construction that such

a forum selection clause is mandatory and enforceable. The clause in that case read:

> This Agreement shall be governed by the laws of the State of New York, U.S.A. All parties hereby submit to the jurisdiction of the courts of the state of New York in regard to any claim, dispute or controversy relating to this Agreement, and all parties agree to accept services of process by mail.

The question before Judge Lasker was whether Fotheringham was bound by the forum selection clause to litigate a dispute under the contract in New York. The Court held that under federal law, the above language is mandatory.

Similarly, in *600 Grant Street Associates Limited Partnership v. Leon-Dielman Investment Partnership*, 681 F. Supp. 1062, 1063-64 (S.D.N.Y. 1988), Judge Sweet found that a choice of law and forum clause containing language virtually identical with that of the parties' loan documents, including "Any suit . . . may be brought in the state courts of, or the federal courts in, New York . . ." and that New York law "governed" the transaction were binding upon the parties.

Contrary to the District Court's erroneous finding that the loan documents explicitly permitted the parties to institute suit in "New York, *or elsewhere*" (Appendix B, p. 10a, emphasis in original), the parties' loan documents do not reserve the right to either party to commence an action in any jurisdiction other than New York or in any court other than in the New York County Supreme Court or the United States District Court for the Southern District of New York. They also do not permit the application of any law other than the law of New York. In these circumstances, it is appropriate to find that actions concerning the parties' agreements be litigated in New York, rather than in any foreign forum, and that New York law governs the parties agreement, rather than foreign law.

Babcock & Wilcox Company, Inc. v. Control Components, Inc., 161 Misc.2d 678, 614 N.Y.S.2d 678 (Sup. Ct. N.Y.Co. 1993) illustrates the mandatory nature of the parties' choice of law and forum selection agreement. In that case the defendant threatened to commence suit in Ohio for alleged breach of contract. The plaintiff commenced a declaratory judgment and injunction action to prevent commencement of the Ohio suit.

The defendant argued, as did ABN here, that the forum selection clause was permissive. In rejecting the defendant [and the ABN's] argument, the Court noted that the parties agreed that their contract "*shall be* governed by New York law", as did the parties in our case; that the parties' agreement provided for consensual submission to the jurisdiction of New York's courts, as does the contract in our case; and that New York's policy, expressed in §§ 5-1401 and 2 of its General Obligations Law is that parties be required to maintain their actions in New York's courts when they provide in their agreements for a choice of New York law and forum to govern their transactions.

Judge Lasker agreed, in *Cambridge Nutrition*, 840 F. Supp. 299, at 302, finding that "New York courts have interpreted the statutory scheme broadly to enforce choice of forum clauses and accept jurisdiction."

The Second Circuit, in *Boutari*, *supra*, at 22 F.3d 53, confirmed "[o]f course if mandatory venue language is employed, the clause will be enforced." We submit that here, the loan agreements both conferred jurisdiction upon and specified venue in the Supreme Court, New York County, and United States District Court for the Southern District of New York, evidencing the parties' intent that the forum selection clause was mandatory and enforceable. For these reasons, the District Court erred in determining that the forum selection clause in the loan documents was permissive as a matter of law.

Boutari is further distinguishable from our case because there, the District Court clearly had jurisdiction over all of the parties. In our case, the Israeli courts did not have plenary jurisdiction over Commodities or Holdings, which are Delaware corporations with principal places of business in New York. ABN had no contact with Israel and absent a voluntary entry into the country was not subject to Israeli court jurisdiction. In these circumstances, it would have been beyond the reasonable contemplation of the parties that any action would be brought in Israel to determine the rights of these American entities with respect to the loan documents. This Court recognized in *Boutari* (also citing Judge Weinfeld at 477 F. Supp. 443), that

> The normal construction of the jurisdiction rules includes a presumption that, *where jurisdiction exists,* it cannot be ousted or waived absent a clear indication of such a purpose (emphasis added).

The converse must also be true. Where jurisdiction does not exist in a particular court, and the parties agree to irrevocably submit to jurisdiction and to venue in a specified court, then their agreement should not be construed to permit institution of actions in locations where jurisdiction is lacking.

When applied to the forum selection clause in our case, the traditional *forum non conveniens* analysis would also warrant selection of the New York forum as agreed to by the parties. *Gulf Oil v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947); *In re Air Crash v. Pan American World Airways, Inc.,* 821 F.2d 1147, at 1162, 1164 (5th Cir. 1987).

New York was the forum of law governing construction of the contract. New York was the place of execution of the contract. New York was the place where the transaction was to be performed (by payment in American dollars to ABN's New York branch). New York

was the location of both Commodities' and Holdings' principal places of business, the place where ABN's branch office was located and the place where Commodities', Holdings', and ABN's officers who participated in the transaction were located. The evidence of performance was in New York. And ABN's own form contract called for litigation of all disputes in New York.

The New York courts are most familiar with New York law and it serves the interests of justice for American entities to litigate their affairs in their own country and state. See, e.g., *Cambridge Nutrition A.G. v. Fotheringham,* 840 F. Supp. 299, at 302 (1994), citing *Credit Francais v. Sociedad Financiera,* 128 Misc. 2d 564, 490 N.Y.S.2d 670 (Sup.Ct. N.Y.Co. 1985):

> New York, as the center of international trade and finance, has expressly recognized . . . that its courts will be hospitable to the resolution of all substantial contractual disputes in which the parties have agreed beforehand that our neutrality and expertise should govern their relationships.

When ABN sought liquidation of Commodities and Holdings in Israel, it also sought a forum which did not have *in personam* jurisdiction over those parties. Such forum shopping is not permitted by our courts. See, e.g., *In re Air Crash, supra,* at 821 F.2d. 1163 (the doctrine of *forum non conveniens* presupposes the existence of at least two forums in which all defendants are amenable to process). This action, too, was contrary to our expressed public policy that foreign courts have an interest in liquidating or winding up the affairs of their own corporations, *Cunard Steamship Company Limited v. Salen Reefer Services AB,* 773 F.2d 452 (2d Cir. 1985) and the converse, that American courts have a paramount interest in liquidating American corporations.

The District Court's decision in this case would permit any contracting party to litigate a contractual dispute

between American corporations in any forum in the world, regardless of the degree of connection that such forum had to the parties, the business transaction in issue or the governing law, unless the contracting parties provided in their agreement that a selected forum was the exclusive forum for resolution of their dispute.

The decision prevents parties who have agreed to submit to the jurisdiction of New York's courts for determination of their disputes from being certain that such forum would be the arbiter of their disputes. This is contrary to the very purpose of a forum selection clause. See *M/S Bremen v. Zapata Off-Shore Company,* 407 U.S. 1, at 13-14, 92 S.Ct. 1907, at 1915, 32 L. Ed.2d 513 (1972), where the court reasoned:

> Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the Bremen or Unterweser might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting.

and concluded, at 407 U.S. 15, 92 S.Ct. 1916:

> Thus, in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.

III. THE COMPLAINT STATES A VALID CLAIM FOR TRESPASS AND CONVERSION.

The complaint states facts sufficient to show that ABN had no relationship with Holdings, yet it commenced liquidation proceedings against it in Israel so that it could recover the proceeds from liquidation of Holdings' assets, and which have and will result in Holdings losing substantial personal and real property.

Holdings has pleaded an unauthorized exercise of ownership over Holdings' assets, based upon misrepresentations to the Israeli courts, which would never be upheld in New York if New York law were applied to the parties dealings, as they agreed it should be. Whether the claim be expressed as one in trespass, conversion or abuse of process, Holdings should have an opportunity to have a trial on the merits of its claim.

ABN tried to defend its conduct by arguing that it was the Israeli court, or the Israeli liquidator (ABN's counsel), that caused Holdings' assets to be sold. This defense is sham, for the Holdings liquidation proceeding would not have occurred at all had ABN not initiated it, prosecuted it, and used its own attorneys as liquidators to deprive Holdings of its assets.

The ABN claim (and District Court excuse) that it was the Israeli liquidator that caused Holdings any damage that it suffered also offers no defense to ABN. If in fact a private party engages in wrongful conduct, the fact that a portion of such conduct may have been engaged in under the authority of a foreign court will not exculpate it from liability. This is especially true since the acts of the foreign officials are not in question here, only the acts of the party who procured such acts through improper conduct. *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corporation, International,* 493 U.S. 400, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990); *Galu v. Swiss Air Transport Co., Ltd.,* 734 F. Supp. 129 (S.D.N.Y. 1990); *Grupo Protexa, S.A. v. All American Marine Slip,* 20 F.3d 1224 (3rd Cir. 1994).

Here, ABN sought the proceeds of Holdings' assets in an Israeli forum, when it had no right to receive any compensation from Holdings. The District Court should have found that ABN converted Holdings' property under the facts alleged in the complaint. The decision to the contrary below should be reversed.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN NOT PERMITTING AMENDMENT OF THE COMPLAINT.

The District Court abused its discretion in not permitting amendment of the complaint. The motion below was the first time that any complaint in this action was subject to review by the District Court. The Second Amended complaint was a proposed pleading put forward by Commodities' counsel, after deleting one claim inserted by predecessor counsel for breach of fiduciary duty (A. 64-65).

The District Court's citation to *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) implied, incorrectly, that the District Court had permitted counsel to amend the complaint once after a prior motion had been decided pointing out any infirmities. This has not occurred in our case. Accordingly, leave to amend should have been freely granted so this action is resolved on the merits. See 2A *Moore's Federal Practice,* ¶ 12.07[2.-5], at 12-99 (1995).

CONCLUSION

Commodities and Holdings are entitled to a day in Court to obtain redress against ABN for its wrongful liquidation of their assets. For these reasons, I respectfully request that the petition be granted and a writ of certiorari issued by this Court.

Respectfully submitted,

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APPENDIX A

[Filed Aug. 21, 1996]

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of August, one thousand nine hundred and ninety-six.

Present: HON. THOMAS J. MESKILL,
HON. GUIDO CALABRESI,
HON. FRED I. PARKER,
Circuit Judges.

#96-7024

RED ROCK COMMODITIES, LTD.
and RED ROCK HOLDINGS LTD.,
Plaintiffs-Appellants,

v.

ABN-AMRO BANK, N.A.,
Defendant-Appellee.

ORDER

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the Eastern District of New York (Scheindlin, *J.*), it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is AFFIRMED.

Red Rock Commodities and Holdings sued ABN for damages arising out of a complex series of transactions that culminated in ABN seeking the appointment of a liquidator and instituting foreclosure proceedings against Red Rock in Israel. The United States District Court for the Eastern District of New York (Scheindlin, *J.*) found that none of Red Rock's allegations were sufficient to state a cause of action and dismissed the complaint pursuant to 12(b)(6). Red Rock appeals. We review the grant of a 12(b)(6) motion *de novo*. *Hertz Corp. v. City of New York*, 1 F.3d 121, 125 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1054 (1994). Applying that standard, we affirm for substantially the reasons given by the district court.

In passing, the district judge found that since liquidation and foreclosure were procedural, the choice-of-law provision in the contract between Red Rock and ABN that stated that New York law would apply was irrelevant. *See Woodling v. Garrett Corp.*, 813 F.2d 543, 551 (2d Cir. 1987) (contractual choice-of-law provisions implicate substantive but not procedural law). We note that while the appointment of a liquidator is procedural, elements of the liquidation and foreclosure themselves may be substantive. Red Rock did not, however, allege in more than a conclusory fashion that there were any relevant differences between New York and Israeli law with regard to the substantive law of liquidation and foreclosure as they would apply to this case. Thus, even if substantive law were implicated, the complaint failed to state a claim on which relief could be granted.

We have examined all the appellant's contentions, and find them to be without merit. The district court's judgment is therefore affirmed.

/s/ Thomas J. Meskill
THOMAS J. MESKILL

/s/ Guido Calabresi
HON. GUIDO CALABRESI

/s/ Fred I. Parker
HON. FRED I. PARKER
Circuit Judges

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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94 Civ. 8390 (SAS)

RED ROCK COMMODITIES, LTD.,
and RED ROCK HOLDINGS, LTD.,
Plaintiffs,

- against -

ABN-AMRO BANK, N.A.,
Defendant.

OPINION & ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

Defendant ABN-AMRO Bank, N.A. ("ABN-AMRO") moves, pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 9(b), to dismiss the complaint filed against it by Plaintiffs Red Rock Commodities, Ltd. ("Commodities") and Red Rock Holdings, Ltd. ("Holdings") (jointly "Red Rock"). For the reasons set forth below, the motion is granted.

BACKGROUND

Both Commodities and Holdings are Delaware corporations with their principal place of business in New York, New York. *See* Second Amended Complaint ("Am. Compl.") at ¶¶ 1, 2. Commodities engaged in international commodities transactions, while Holdings has engaged in real estate and busines ventures. *See id.*

On June 1, 1990, ABN-AMRO, a Dutch bank with its principal place of business in the Netherlands and maintaining an office in New York, New York, extended Com-

modities a fifteen million dollar credit line. *See* Promissory Note ("Note") and Security Agreement ("Sec. Agreement"), Exs. A & B annexed to Am. Compl. Using a portion of this credit line, Commodities purchased "steel billets", manufactured in Poland, and subsequently arranged for the sale and transportation of this steel to Ram Products, Inc. ("Ram") in Israel. *See* Am. Compl. at ¶¶ 9, 10.

In August, 1992 Commodities discovered that some $35 million worth of steel billets were either "fraudulently consumed or disposed of by Ram." *Id.* at ¶ 12. By this time, ABN had advanced Commodities $10 million to finance the steel billet transactions. *See id.*

Commodities believed it could protect its interests by an appointment as Ram's receiver. *See id.* at ¶ 15. With this arrangement, Commodities claims, Ram would have continued to operate and to generate profits which, in turn, could have been used to discharge Ram's debt. *See id.*

When ABN-AMRO was informed of Commodities' intended application to be appointed receiver of Ram, its representative, Paul Feldman, indicated support for the plan. *See id.* at ¶ 16. During the receivership proceedings before an Israeli court, however, ABN-AMRO opposed the appointment of Commodities' representative. *See id.* at ¶ 17. This led to the appointment of another creditor's counsel "to assist in liquidating Ram." *Id.* at ¶ 18.

In June, 1993, ABN-AMRO's representative was appointed by the Israeli court as the Interim Liquidator of Commodities and Holdings. *See id.* at ¶¶ 21, 25. Commodities and Holdings assert that this appointment breached the express terms of the Note and the Security Agreement which require that the loan agreement be governed by New York law and that litigation be brought in New York courts. *See id.* at ¶¶ 29-32. ABN-AMRO's actions are also alleged to have been a breach of the im-

plied covenant of good faith and fair dealing. *See id.* at ¶¶ 34, 35. Commodities also claims that the alleged misrepresentation of ABN-AMRO's intentions regarding its support of Commodities' appointment as receiver was both fraudulent and constituted a tortious interference with business relations. *See id.* at ¶¶ 37-42, 45-47. Plaintiffs finally claim that two foreclosure proceedings, instituted by the Interim Liquidator against two of Holdings' properties in Israel, constitute both conversion and trespassory taking. *See id.* at ¶ 50.

DISCUSSION

I. *Legal Standard*

When considering a motion to dismiss, all factual allegations contained in the complaint are presumed to be true. *See Paulemon v. Tobin*, 30 F.3d 307, 308 (2d Cir. 1994); *see also Cohen v. Koenig*, 25 F.3d 1168, 1172 (2d Cir. 1994). Further, all reasonable inferences are to be drawn in favor of the non-moving party. *See Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991). A complaint is dismissed, therefore, only if "it appears beyond doubt that the plaintiffs can prove no set of facts in support of [the] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

II. *Breach of Contract*

The "contract" at issue is the sum of three documents: the promissory note, the security agreement and the terms and conditions. *See* Exs. A, B & C (the "loan agreement") annexed to the Am. Compl. The loan agreement contains a permissive, rather than mandatory, choice of forum clause.

> Any suit, action or proceeding against the undersigned with respect to this agreement may be brought in the Supreme Court of the State of New York,

County of New York or in the United States District Court for the Southern District of New York.

¶ XII of Terms and Conditions, annexed to Notice of Motion as Ex. C. The agreement, therefore, plainly states that an action "may" be brought in New York. Addressing a similar choice of forum clause, employing the term "shall", the Second Circuit held that " 'an agreement *conferring* jurisdiction in one forum will not be interpreted as *excluding* jurisdiction elsewhere unless it contains specific language of exclusion.' " *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Importers & Distribs., Inc.*, 22 F.3d 51, 53 (2d Cir. 1994) (quoting *City of N.Y. v. Pullman, Inc.*, 477 F. Supp. 438, 442 at n.11 (S.D.N.Y. 1979)). The loan agreement contains no such exclusionary language and therefore, as a matter of law, the contract does not prohibit ABN-AMRO from availing itself of the Israeli forum.

Commodities alleges ABN-AMRO also breached the loan agreement when it "urg[ed] the Israeli Court to apply Israeli law [in appointing] an Interim Liquidator." Am. Compl. at ¶ 29(b). Commodities contends that the loan agreement requires that the loan transaction be governed by New York law. The pertinent choice of law provision in this agreement states that: "[T]he rights and obligations of the Bank and of the undersigned hereunder shall be governed by and construed in accordance with the law of the State of New York." Am. Compl. at Ex. B, ¶ 11.

New York honors a contractual choice of law provision "insofar as matters of substance are concerned." *Woodling v. Garrett Corporation*, 813 F.2d 543, 551 (2d Cir. 1987) (citing *A.S. Rampell, Inc. v. Hyster Co.*, 3 N.Y.2d 369, 381 (1957)). A "contractual choice of law provision is deemed to import only substantive law . . . not procedural law." *Id.*, citing, among others, *Sears, Roebuck & Co. v. Enco Assocs., Inc.*, 43 N.Y.2d 398, 397

(1977), *Restatement (Second) of Conflict of Laws* § 187(3) & comment h. Accordingly, procedural questions are decided under the law of the forum. *See Intercontinental Planning v. Daystrom, Inc.*, 24 N.Y.2d 372, 381 (1969). Foreclosure and liquidation actions are inherently procedural and therefore are not governed by the contractual choice of law provision.

III. *Breach of Implied Covenant of Good Faith and Fair Dealing*

New York implies a covenant of good faith and fair dealing in all contracts. *Filner v. Shapiro*, 633 F.2d 139, 143 (2d Cir. 1980). This covenant "precludes each party from engaging in conduct that will deprive the other party of the benefits of their agreement. . . . [and] [i]ntegral to a finding of a breach of the implied covenant is a party's action that directly violates an obligation that may be presumed to have been intended by the parties." *Id.* at 136. *See also Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522 (2d Cir. 1994); *Sharma v. Skaarup Ship Mgmt. Corp.*, 699 F. Supp. 440, 449 (S.D.NY. 1988), *aff'd*, 916 F.2d 820 (2d Cir 1990), *cert denied.* 499 U.S. 907 (1991).

Plaintiffs allege that ABN-AMRO's failure to support Commodities' appointment as the Ram receiver breached the covenant of good faith and fair dealing. *See* Am. Compl at ¶ 34(a). An implied covenant of good faith and fair dealing "does not extend so far as to undermine a party's 'general right to act on its own interests in a way that may incidentally lessen' the other party's anticipated fruits from the contract." *M/A-COM Security Corp. v. Galesi*, 904 F.2d 134, 136 (2d Cir. 1990) (quoting *Van Valkenburgh, Nooger & Neville Inc. v. Hayden Publishing Co.*, 30 N.Y.2d 34, 46, *cert. denied*, 409 U.S. 875 (1972)). As ABN-AMRO asserted its own $10 million claim in the RAM liquidation proceedings (Am. Compl. at ¶ 17), it was presumably acting in its own interest

when it opposed Plaintiffs appointment as liquidator. It would defy common sense to accept that ABN-AMRO opposed this appointment in order to jeopardize Plaintiffs' ability to repay the $10 million owed to ABN-AMRO.

Plaintiffs further allege that the implied covenant barred ABN-AMRO from pursuing its rights in the Israeli courts under Israeli law. *See* Am. Compl. ¶ 34(b). No implied covenant may conflict with the express terms of a contract. *See Sharma*, 699 F. Supp. at 449; *see also CIBC Bank & Trust Co. v. Banco Cent. do Brasil*, No. 94 Civ. 4733, 1995 U.S. Dist. LEXIS 6268, *32-33 (S.D.N.Y. May 9, 1995) ("[T]he implied obligation is in aid and furtherance of other terms in the agreement . . . . No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship."). As noted earlier, the loan agreement does not limit the parties to the jurisdiction and/or laws of New York. Implying such a limiting term or covenant would be contrary to the terms of the agreement and is not permitted.

In a related claim, Plaintiffs allege that ABN-AMRO made various misrepresentations to the Israeli Court "thereby obtaining appointment of its counsel as Interim Liquidator of Commodities *in Israel*." Am. Compl. ¶ 34(c) (emphasis added). This appointment is claimed to have harmed Commodities' business interests and therefore to have breached the implied covenant. *See* Am. Compl. ¶ 35. Plaintiffs state that ABN-AMRO's misrepresentations led to the Israeli court's acceptance of jurisdiction and the application of Israeli law which led to the subsequent appointment of ABN-AMRO's counsel as Interim Liquidator. *See id.* Whether or not misrepresentations were made during the court proceeding, ABN-AMRO was in no way barred from seeking the appointment of a Liquidator by an Israeli court. To imply a term prohibiting ABN-AMRO from participating in the

Israeli liquidation proceedings would conflict with the express terms of the contract. *See id.*, Ex. B at ¶ 7 (upon default . . . "[t]he Bank shall be entitled to the immediate possession of the Collateral" and may "exercise any and all of the rights and remedies provided by . . . the Terms and Conditions . . . .); *see id.*, Ex. C. at ¶ XII (permitting any action against the borrower to be brought in New York *or elsewhere*) (emphasis added).

ABN-AMRO also is alleged to have breached the implied covenant as the result of the Interim Liquidator's filing of "an ancillary petition in the United States Bankruptcy Court pursuant to 11 U.S.C. § 304 . . . seeking the turnover of all property of Commodities and Holdings" in the United States. Am. Compl. at ¶ 34(e). Because this action was taken by the Interim Liquidator, it cannot support a claim against ABN-AMRO.

Finally, Plaintiffs allege that ABN violated the implied covenant by failing to make "demand for payment as required by the Note". Am. Compl. at ¶ 34(d). There is no such requirement contained in the loan agreement. Upon default, the borrower's "liabilities shall become immediately due and payable without notice, demand of payment or presentment, all of which are hereby expressly waived." *Id.*, Ex. B at ¶ 7. Default is defined as "any event described in section VI of the Terms and Conditions." *Id.* at ¶ 7(b). Section VI of the Terms and Conditions provides that the Bank may find the borrower in default "in case the Bank deems itself insecure." *Id.*, Ex. C at ¶ VI.[1] Plaintiffs fail to allege any facts which could

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[1] Short of default, the Security Agreement provides that the Bank, upon demand, may require the borrower to "furnish such further security or make such payment on account of the liabilities as will be satisfactory to the Bank." Am. Compl., Ex. B at ¶ 6. Plaintiffs submit, however, as part of their complaint, a letter from Mr. Pri-Har, President of Commodities, to ABN-AMRO stating taht no "substitute collateral" was available. *Id.*, at Ex. D. Demand for such "further security" would have been useless.

contradict the Bank's subjective conclusions regarding the security of its debt.

IV. *Fraud*

"To plead a claim for fraud, [a plaintiff] must allege in the body of the complaint; (a) an express representation of a material fact; (b) that this representation was false; (c) that the representation was made with the intent to defraud; (d) that [the plaintiff] reasonably relied upon this representation; and (e) that [the plaintiff] suffered damages as a result." *Zaro Licensing, Inc. v. Cinmar, Inc.*, 779 F. Supp. 276, 284 (S.D.N.Y. 1991) (citing *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 970-71 (2d Cir. 1987)). Fed. R. Civ. P. 9(b) requires that fraud be alleged "with particularity." Merely reciting the elements of fraud is not sufficient to satisfy the Rule 9(b) requirements. *See Airlines Reporting Corp. v. Aero Voyagers, Inc.*, 721 F. Supp. 579, 582 (S.D.N.Y. 1989); *see also Hunter v. H.D Lee Co*, 563 F.Supp. 1006, 1012 (N.D.N.Y. 1983) ("A pleading that simply avers the technical elements of fraud does not have sufficient informational content to satisfy [Rule 9(b)'s] requirement.").

Plaintiffs fail to allege any facts which would establish an adequate causal link between the alleged fraudulent misrepresentation and the asserted consequences. Such "[i]nadequate causation is . . . fatal to a common law fraud claim under N.Y. law." *Revak v. SEC Realty Corp.*, 18 F.3d 81, 89 (1994) (quoting *Bennet v. U.S. Trust Co. of N.Y.*, 770 F.2d 308, 316 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986)). Further, "[t]he requisite causation is established only where the loss complained of is a direct result of the defendant's wrongful actions and *independent of other causes.*" *Id.*, at 89-90 (emphasis added). Plaintiffs asert that the Israeli Court (1) denied Commodities' application in the Ram proceedings "as a direct result of ABN-AMRO Bank's con-

duct" and (2) that but for the misrepresentation of ABN-AMRO's support for Commodities' application, Commodities "would *not* have proceeded with its plan for appointment as receiver for Ram." Am. Compl. at ¶ 18, 41. However, Plaintiffs have no basis to assert that the court's decision was reached "independent of other causes." In fact, the Israeli court made its own independent determination of who should be the receiver, selecting another creditor's attorney over ABN-AMRO's own attorney. *Id.* at Ex. D and ¶ 18. There is no question that the choice of Receiver did not turn solely on the alleged misrepresentation, independent of other considerations.

Further, the damages alleged by Commodities are too speculative to support the fraud claim. Commodities claimed damages flowed from the alleged misrepresentation, but for which Commodities would have taken steps other than seeking receivership of Ram. *Id.* at ¶ 41. This hypothetical conduct ("some other agreement or suitable accommodation with RAM for repayment of its indebtedness") would have safeguarded the $35 million debt owed to Commodiites and would have allowed Commodities to gain control of an $80 million company (RAM). *Id.* at ¶¶ 41, 43.

Such damages have been found to be too speculative. *See e.g., Kregos v. Associated Press*, 3 F.3d 656, 665 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1056 (1994) (damages too remote when court required to speculate as to what plaintiff may have been awarded in a potential copyright case which was prevented by defendant's alleged fraud); *Lehman v. Dow Jones & Co.*, 783 F.2d 285, 296 (2d Cir. 1986) (claim for a lost finder's fee deemed too speculative). To the extent Plaintiffs claim they have been denied the potential benefit of an unspecified solution to their RAM problem, their claimed damages are analogous to those claimed in *Kregos* and *Lehman* and as such are too speculative to sustain the fraud pleading.

V. *Tortious Interference with Business Relations*

A party commits the tort of interference with business relations if it acts with "the sole purpose of harming the plaintiff" or employs "means that are 'dishonest, unfair or in any way improper' ". *Martin Ice Cream Co. v. Chipwich, Inc.*, 554 F. Supp. 933, 945 (S.D.N.Y. 1983) (quoting *Robbins v. Ogden Corp.*, 490 F. Supp. 801, 811 (S.D.N.Y. 1980)). ABNs intervention in the Ram receivership proceedings allegedly denied Commodities the business advantage that would have flowed from its appointment as receiver. *See* Am. Compl. ¶ 46. Further, the court-appointed liquidator of Holdings interfered with Plaintiffs' business by permitting one of Holdings' creditors to foreclose upon Holdings' property. *See id.*, at ¶ 47. Ts noted earlier, this latter allegation pertains to conduct over which ABN had no control.

With respect to the alleged interference resulting from ABN-AMROs involvement in the Ram receivership proceedings, Commodities alleges no facts which would establish ABN acted with the "sole purpose of harming the plaintiff." *Martin Ice Cream Co.*, 554 F. Supp. at 945. *See* Am. Compl. at ¶¶ 46, 47. Indeed, the pleading acknowledges that ABN-AMRO advanced "its own claims" in this proceeding. Am. Compl., at ¶ 17. Accordingly, when the alleged "interference is intended, at least in part, to advance its own interests, the claim *will fail* unless the means employed include criminal or fraudulent conduct." *PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc.*, 818 F.2d 266, 269 (2d Cir. 1987). For the reasons discussed above, there is no valid claim of fraud. In addition, no allegation of criminal conduct has been made. Thus, Plaintiffs have failed to allege a tortious interference with business relations.

VI. *Conversion and Trespassory Taking*

Plaintiffs claim ABN "converted and unlawfully took property belonging to Commodities and Holdings", spe-

cifically an office building in Givatim, Israel, and another building in Jaffa, Israel. Am. Compl. at ¶ 50.

Conversion may be claimed only with respect to personal, as opposed to real, property. *East River Sav. Bank v. Secy of Hous. & Urban Dev.*, 702 F. Supp. 448, 455 (S.D.N.Y. 1988) (citing *Boll v. Town of Kinderhook*, 99 A.D.2d 898, 899, 472 N.Y.S.2d 496, 498 (3d Dep't 1984)). Because Plaintiffs assert a conversion claim with respect to real property, the claim must be dismissed.

Thespassory taking is not an independent cause of action. Rather, it is an element of larceny. *See* N.Y. Penal Law § 155.05(2) (McKinney 1988) ("Larceny includes a wrongful taking . . . [with intent] . . . committed . . . [b]y conduct heretofore defined or known as common law larceny by trespassory taking"); *see also Bell v. United States*, 462 U.S. 356, 358-9 (1982) (tracing the evolutio of larceny). If Plaintiffs intended to allege larceny (theft), they fail to state that claim. *See* Am. Compl. at ¶¶ 49, 50. Plaintiffs do not allege that the unlawful ("trespassory") taking was committed with the requisite intent. *See* N.Y. Penal Law §§ 155.05(1) (the "intent to deprive another of property or to appropriate the same to himself or ot a third person"). Furthermore, "an assertion that 'property was appropriated under a claim of right made in good faith' is a defense to larceny." *People v. Reid*, 69 N.Y.2d 469, 515 N.Y.S.2d 750 (1987) (quoting N.Y. Penal Law § 155.15(1)). *See also People v. Chesler*, 50 N.Y.2d 203, 209-10, 428 N.Y.S.2d 639 (1980) (clarifying that a claim of right is an ordinary defense, not an affirmative defense, in a larceny prosecution). A court ordered foreclosure subsequent to liquidation proceedings provides the liquidator, and ABN-AMRO, with such a claim of right. *See e.g. People v. Teplitz*, 27 A.D.2d 891, 277 N.Y.S.2d 843, 844 (3d Dep't 1967) ("where the defendant had some legal basis for claiming title (chattel mortgage in default) to the property . . . the issue of intent to deprive the alleged owners thereof is a *non sequitur*").

Regardless of the confused nature of the "trespassory taking" claim, the conduct complained of was committed by the court appointed liquidator of Commodities and Holdings. *See* Am. Compl. at ¶ 50. ABN-AMRO did not direct the actions of the liquidator when he permitted another creditor to foreclose on the property in Givatim. By the Plaintiffs' own admission, the *Israeli court* gave ABN-AMRO permission to liquidate and sell Holdings' property in Jaffa. *See id.* It is the Israeli court, and the Liquidator appointed by that court, who bear responsibility for the actions complained of (whether theft, trespass, conversion, or some other act), not ABN-AMRO.

CONCLUSION

For the reasons stated the motion to dismiss is granted on all claims. Plaintiffs have amended their complaint twice, once without the permission of the Court. Plaintiffs now request leave to amend their complaint a third time. However, Fed. R. Civ. P. 15(a) does not permit amendment when there has been "repeated failure to cure deficiencies by amendment previously allowed." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Having failed to cure the deficiencies in two previous amendments, leave to further amend the complaint is denied.

/s/ Shira A. Scheindlin
SHIRA A. SCHEINDLIN
U.S.D.J.

Dated: New York, New York
December 1, 1995

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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94 Civ. 8390 (SAS)

RED ROCK COMMODITIES, LTD.,
RED ROCK HOLDINGS, LTD.,
Plaintiff

VS.

ABN-AMRO BANK N.V.,
Defendants.

SECOND AMENDED COMPLAINT
(JURY TRIAL DEMANDED)

Plaintiffs Red Rock Commodities, Ltd. and Red Rock Holdings, Ltd., by their attorneys Gallet Dreyer & Berkey, LLP, as for their Second Amended Complaint, respectfully allege:

1. Red Rock Commodities, Ltd. ("Commodities") is a United States corporation, duly organized under the laws of the State of Delaware and with a principal place of business in New York, New York. At all relevant items herein, Commodities has been engaged in international commodities transactions.

2. Red Rock Holdings, Ltd. ("Holdings") is a United States corporation, duly organized under the laws of the State of Delaware and with a principal place of business in New York, New York. At all relevant times herein, Holdings has been engaged in real estate and business ventures.

3. ABN-AMRO Bank N.V. was and still is a banking corporation organized and existing under and pursuant to the laws of the Netherlands with its principal place of business in Netherlands and maintaining an office in New York, New York ("the Bank").

JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1332 (a) because the action is between a citizen of a foreign state and a citizen of a state and because the amount in controversy exceeds the sum of $50,000.

5. Venue lies in the Southern District of New York under 28 U.S.C. § 1332 (a) because the plaintiffs reside in this judicial district.

THE FACTS

6. In connection with international commodities transactions, trading companies, such as Commodities, rely upon banks to provide financing in the form of credit facilities.

7. By Promissory Note ("Note"), Security Agreement ("Security Agreement") and Terms and Condition Agreement ("Terms Agreement") dated June 1, 1990, annexed hereto as Exhibits "A", "B", and C, respectively, documents all drafted by the Bank, the Bank opened up a 15 million dollar credit faciilty in Commodities' favor, including for the financing of commodities, which required that Commodities make timely interest payments on any funds borrowed. The Note provided that it was due and payable ". . . on DEMAND, *or, if not* [*sic*] *such agreement is reached and no demand is made, five years from the date hereof*" (emphasis added), i.e., June 1, 1995. Exhibit "A", p.1. Both the Note and the Security Agreement expressly provided that the loan transaction, "shall be governed and construed in accordance with the law of the State of New York.' *See* Exhibit "A", p. 2; Exhibit

"B", p. 5. Likewise, the Terms Agreement provided in pertinent part:

> This agreement shall become effective upon being executed by the undersigned and it and the rights and obligations of the Bank and of the undersigned hereunder shall be governed by and construed in accordance with the laws of the State of New York. Any suit, action or proceedings against the undersigned with respect to the agreement may be brought in the Supreme Court of the State of New York, County of New York or in the United States District Court for the Southern District of New York and the undersigned hereby irrevocably submits to the jurisdiction of such courts for the purpose of any such suit, action, or proceeding. . . .

Exhibit "C", pp.3-4. The loan documents were executed by the parties in New York. Thereafter, Commodities made timely interest payments as they became due to the Bank, in United States dollars, to the New York branch of the Bank.

8. Holdings was not a party to the Note or Agreement.

9. Beginning in November, 1990, Commodities entered into an arrangement to provide steel billets manufactured in Poland to Ram Metals and Construction Industries, Ltd. ("Ram"), in Israel. Pursuant to the arrangement, any payment which was due the steel exporters in Poland and any shipping or related charges would be remitted by or paid for on behalf of Commodities, and the subject steel would be delivered in Israel for release to Ram upon payment as agreed between the parties ("Steel Billet Transactions").

10. In furtherance of the agreement between Commodities and Ram, substantial quantities of steel billets were purchased by Commodities from exporters in Poland, arrangements were then made for shipment of the steel

by ocean vessel to Israel, and original bills of lading for the steel were issued by the exporters to Commodities.

11. In order to support the Steel Billet Transactions, Commodities obtained financing from several lenders, including use of a portion of its $15 million dollar credit facility with ABN-AMRO Bank—New York, to whom the original bills of lading were assigned as collateral security for repayment of the bank financing.

12. In August of 1992, Commodities discovered that nearly $35 million dollars of steel billets, which were the subject of the Steel Billet Transactions, were either fraudulently consumed or disposed of by Ram in violation of the agreement between Ram and Commodities. At that time, ABN-AMRO Bank had extended Commodities approximately $10 million dollars to finance Steel Billets Transactions for Ram, although no Demand for payment of the principal balance had been made under the Note.

13. At considerable expense, Commodities immediately initiated steps to preserve and protect its position and interests.

14. Commodities provided its lenders with information concerning Ram, the obligations due Commodities, the security available to protect Commodities' position in the assets of Ram, the persons who might be liable for damages based on conduct detrimental to Commodities or its lenders, and other information concerning the activities of Commodities.

15. Part of Commodities' plan to protect its interests was to make application to an Israeli court that Commodities' attorney be appointed *receiver* for Ram in order that Ram could continue to operate—albeit under new management and control—to generate profits to repay the steel loan. Commodities was Ram's largest secured creditor and was owed approximately $35 million. Under Israeli law, it is customary to appoint the largest secured creditor of a troubled corporation as receiver.

16. Prior to appearing in the Israeli Court, Commodities' President, Menachem Pri-Har, fully discussed Commodities' plan to apply for receivership with its lending banks, including with Paul Feldman, a Vice-President of ABN-AMRO Bank. All lenders were supportive of Commodities' plan, including Feldman who represented that he, too, concurred with Commodities strategy for its appointment as receiver of Ram.

17. At a hearing before the Israeli Court on or about August 23, 1992, ABN-AMRO Bank, without prior warning to Commodities, sent its own attorney, Attorney Rosovsky, of the law firm Zadok, Striks, Sella & Co., Tel Aviv, Israel, to the court proceeding regarding Ram. The Bank failed to support Commodities request to be appointed receiver of Ram and asserted its own claims against Ram based upon the Bank's loan to Commodities —even though the Bank had not entered into any contract with Ram, and even though Commodities had fully performed all of its obligations under the Note and Security Agreement with the Bank, including its making timely interest payments as they became due.

18. Although the Israeli court was initially favorably disposed to Commodities' plan to keep Ram operating through appointment of a *receiver*, especially since Commodities was Ram's largest secured creditor, it quickly changed its view as a result of the apparent dissention among the creditors caused by the conduct of ABN-AMRO Bank. As a direct result of ABN-AMRO Bank's conduct, the court denied Commodities' application to be appointed as receiver of Ram, and ultimately appointed another creditor's counsel, Maritime Bank, to assist in liquidating Ram.

19. By letter dated August 27, 1992, Commodities' President, Mr. Pri-Har, complained to Paul Feldman of ABN-AMRO Bank that the bank's conduct at the Israeli court hearing seriously harmed Commodities' interests. A copy of this letter is annexed hereto as Exhibit "D".

20. As a result of the ultimate liquidation of Ram, Commodities' ability to protect and prosecute its interests in relation to Ram has been seriously prejudiced and harmed. ABN-AMRO's conduct, which caused Ram's *liquidation*, precluded Ram's loans being repaid by profits generated from Ram's continued operation under receivership as proposed by Commodities, thus making it impossible for Commodities to receive payment from Ram and, in turn, to continue to fully perform its obligation under the Loan Agreement with the Bank.

21. Subsequently, in June of 1993, ABN-AMRO Bank of New York, through its counsel, Ilan Shavit, also of Zadok, Striks, Sella & Co., made application to the Israeli Court for appointment as Interim Liquidator of both Commodities and Holdings, even though Holdings had no agreement nor involvement with the Steel Billet Transaction and no indebtedness to the Bank, nor any other bank; Commodities and Holdings were United States Corporations with their principal place of business in New York; the parties' (the Bank and Commodities) Note and Agreement specified that its loan transaction would be governed by New York law and that any litigation must be commenced in either New York state or federal courts; and, the Bank had not made any Demand for payment as required by the Note, and thus, the Note was still not due and payable until June 1, 1995.

22. Except for its application for appointment as temporary liquidator in Israel, the Bank had not, and has not, filed any suit against Commodities, nor has it obtained any judgment against Commodities.

23. Except for its application for appointment as temporary liquidator in Israel, the Bank had not, and has not, filed any suit against Holdings, nor has it obtained any judgment against Holdings.

24. At the hearing before the Israeli Court in June, 1993, ABN-AMRO Bank, through its counsel, Attorneys

Rosovsky and Shavit, improperly argued numerous points to the court, including, among other things: that Holdings was also involved in the Ram steel loan transaction and had obligated itself to the Bank on loan documents even though it knew that Holdings was not in any way indebted to the Bank; that Commodities' and Holdings' primary assets were located in Israel and thus it was appropriate for an Israeli court to appoint an Interim Liquidator even though it knew Commodities' and Holdigns' principal place of business and principal assets were in the United States; that Commodities was in violation of the parties' agreement and was justly indebted to ABN-AMRO Bank even though it knew that Commodities was not in violation of the agreement and that it had fully performed thereunder, including its making timely interest payments until and but for the Bank's improper conduct described above, and the Bank had not made any demand as required by the Note and thus Commodities was not so indebted; that Holdings and Commodities were insolvent even though they were not insolvent; and, that it would be appropriate for an Israeli court to accept jurisdiction and apply Israeli law in resolving the parties' dispute and appointing the Bank's representative as an Interim Liquidator, even though the parties' contract provided that New York law governed the transaction and the proper forum and venue for any dispute was in New York state or federal courts, and the Bank knew that New York law would *not* have permitted the liquidation of either Commodities or Holdings.

25. As a result of these and other misrepresentations by the Bank, the Israeli court accepted jurisdiction of the dispute and applied Israeli law—in violation of the forum and choice-of-law clause in the parties' agreement which required that New York law govern and that any dispute be litigated in New York courts—appointing Mr. Shavit as an Interim Liquidator of Commodities and Holdings in Israel on or about June 6, 1993, thereby further harm-

ing Commodities' and Holding's ability to fully protect their interest and preserve their assets abroad.

26. Upon information and belief, the Bank, through its counsel, knowingly and willfully avoided litigating any dispute in the United States, where it knew Commodities' and Holdings' interests would be more rigorously protected under New York law as required by the parties' agreement, and that liquidation of Commodities or Holdings under the circumstances would have been impossible under New York law, and thus filed its action for liquidation in Israel where it knew it was comparatively very easy for a bank to obtain the liquidation of a corporation.

27. Subsequently, the Bank attempted to complete its total circumvention of New York law through the actions of its counsel, Mr. Shavit, whom the Israeli Court appointed as an Interim Liquidator of Commodities and Holdings ("the Petitioner"), by the filing of a Petition in a Case Ancillary to Foreign Proceedings on September 25, 1994, pursuant to 11 U.S.C. § 304, *In re: Petition of Ilan Shavit as Interim Liquidator of RED ROCK COMMODITIES, LTD. and RED ROCK HOLDINGS, LTD.*, United States Bankruptcy Court, Souther District of New York, No. 94-B-44586 (Bernstein, B.J.), seeking, among other things, in aid of the Israeli Court appointment of Mr. Shavit as Interim Liquidator, the turnover of all property of Commodities and Holdings within this country, and the substitution of Mr. Shavit as a party plaintiff in all legal proceedings initiated by Commodities and Holdings around the world, including within this country. The bankruptcy action is pending.

FIRST CLAIM

(Breach of Express Terms of Contract)

28. Commodities repeats and realleges paragraphs 1 through 27, above, as if fully set forth herein.

29. By its conduct fully described above, ABN-AMRO Bank knowingly and willfully violated Commodities' existing rights under the express terms of the Note and Security Agreement by:

(a) Instituting the liquidation action in Israel, even though the Note and Security Agreement required that the forum for any disputes arising under the Note and Security Agreement was in New York courts; and,

(b) urging the Israeli Court to apply Israeli law to appoint an Interim Liquidator for Commodities, even though the Note and Security Agreement required that the loan transaction was governed by New York law.

30. Commodities fully performed its obligations under the Note and Security Agreement, including its making timely interest payments as they became due, until and but for the Bank's improper conduct complained of herein.

31. As a direct and proximate result thereof, the Bank has caused and obtained the appointment of its own counsel as Interim Liquidator in Israel, thereby seriously damaging Commodities' ability to fully conduct and promote its business activities and to protect and preserve its financial interests and assets abroad, including Commodities' ability to repay the indebtedness incurred in relation to the Ram Steel Billet Transaction. By such conduct, ABN-AMRO Bank has violated the express terms of the parties' Note and Security Agreement.

32. By reason of the foregoing, this Court should award compensatory damages in the amount of not less than $100,000,000, punitive damages in like amount, plus attorney's fees and costs incurred to prosecute this action.

SECOND CLAIM

(Breach of Implied Covenant of Good Faith and Fair Dealing)

33. Commodities repeats and realleges paragraphs 1 through 32, above, as if fully set forth herein.

34. By its conduct fully described above, ABN-AMRO Bank has violated the covenant of good faith and fair dealing to Commodities by:

(a) interfering with Commodities' rights and ability to perform under the Note and Security Agreement by knowingly and wilfully misrepresenting that the Bank supported Commodities' application for receivership of Ram and then subsequently appearing in the Israeli court and asserting claims against Ram arising from the Note and Security Agreement, even though there was no default pursuant to the Note and Security Agreement, resulting in the Israeli court's ultimately liquidating Ram, which precluded Ram's loans being repaid by profits generated from Ram's continued operation under receivership as proposed by Commodities, thus making it impossible for Commodities to receive payment from Ram and, in turn, seriously interfering with and/or making it impossible to continue to fully perform its obligations to various lending banks (including ABN-AMRO Bank) to whom Commodities was collectively indebted in the amount of approximately $18 million, and resulting in Commodities' loss of its own working capital invested in the Ram Steel transaction;

(b) violating and interfering with Commodities' existing rights under the Note and Security Agreement by knowingly and wilfully misrepresenting that it would be appropriate for an Israel Court to accept jurisdiction and apply Israeli law in resolving the parties' dispute by appointing the Bank's representa-

tive as a Interim Liquidator of Commodities, even though the parties' contract expressly provided that New York law governed the transaction and that the proper forum and venue for any dispute was in New York state or federal courts, knowing full well that New York law would *not* have permitted the liquidation of Commodities under the circumstances;

(c) knowingly and willfully misrepresenting numerous facts to the Israeli court and thereby obtaining appointment of its counsel as Interim Liquidator of Commodities in Israel, including, among other things, that: Commodities was in violation of the parties' agreement and was justly indebted to the Bank, even though the Bank knew that Commodities was not in violation of the agreement and had fully performed thereunder until and but for the Bank's improper conduct described herein, and the Bank had not made any demand as required by the Note and thus Commodities was not so indebted; Commodities was insolvent, even though the Bank knew or should have known that Commodities was not insolvent; and, Commodities' principal assets were located in Israel and thus it was appropriate for an Israeli court to appoint an Interim Liquidator, even though Commodities' principal place of business and assets were in the United States;

(d) violating Commodities' rights under the contract by unreasonably instituting legal proceedings without first making any demand for payment as required by the Note; and,

(e) attempting to complete its total circumvention of New York law through the action of its counsel, Mr. Shavit, by the filing of an ancillary petition in the United States Bankruptcy Court pursuant to 11 U.S.C. § 304, seeking, in aid of the Israeli Court

appointment of Mr. Shavit as Interim Liquidator, the turnover of all property of Commodities and Holdings within this country, and the substitution of Mr. Shavit as a party plaintiff in all legal proceedings initiated by Commodities and Holdings around the world including within this country.

35. As a direct and proximate result thereof, the Bank, including through its counsel, has seriously damaged Commodities' ability to fully conduct and promote its business activities and to protect and preserve its financial interests and assets abroad, and will continue to damage Commodities' ability to conduct and promote its business activities and to protect and preserve its financial interests and assets at home and abroad, including its ability to repay the indebtedness incurred in relation to the Ram Steel Billet Transaction, and its loss of its own working capital in relation to the Ram Steel Billet Transaction.

36. By reason of the foregoing, this Court should award compensatory damages in the amount of $100,000,000, punitive damages in like amount, plus attorney's fees and costs incurred to prosecute this action.

THIRD CLAIM

(Fraud and Misrepresentation)

37. Commodities and Holdings repeat and reallege paragraph 1 through 36, above, as if fully set forth herein.

38. By its conduct fully described above, ABN-AMRO Bank knowingly and willfully made fraudulent misrepresentations, including misrepresentations by Paul Feldman that the Bank supported Commodities' application for *receivership* of Ram, upon which Commodities' relied and causing Commodities to proceed with its application for appointment as receiver of Ram, then subsequently ap-

pearing in the Israeli court and asserting its own claims against Ram based upon the Note and Security Agreement which were not then in default and by failing to support Commodities' application to be appointed receiver of Ram.

39. As a direct and proximate result thereof, the Israeli Court denied Commodities' application for appointment as receiver, and ultimately liquidated Ram. But for the Bank's conduct described above, the Israeli court would have granted Commodities' application for appointment as receiver of Ram because the court was initially favorably disposed to Commodities' plan to keep Ram operating through appointment of a receiver, especially since Commodities was Ram's largest secured creditor.

40. As a result of such conduct, the Bank seriously harmed Commodities' ability to fully conduct and promote its business activities and to protect and preserve its financial interest and assets abroad, including Commodities' ability to repay its indebtedness incurred in relation to the Ram Steel Billet Transaction. ABN-AMRO's conduct, which resulted in Ram's liquidation, precluded Ram's loans being repaid by profits generated from Ram's continued operation under receivership as proposed by Commodities, thus making it impossible for Commodities to receive payment from Ram and, in turn, to continue to fully perform its obligations under its Loan Agreement with the Bank, as well as its obligations to other lending banks.

41. The Bank's misrepresentations to Commodities that it would support Commodities' application for appointment as receiver of Ram were material and were relied upon by Commodities. Had Commodities known the Bank would *not* support its application for appointment as receiver of Ram, it would *not* have proceeded with its plan for appointment as receiver for Ram because such action might result in Ram's being liquidated, thereby

preventing Ram's continued operation and its repayment of its indebtedness to Commodities from ongoing profits. Instead, Commodities would have reached some other agreement or suitable accommodation with Ram for repayment of its indebtedness to avoid Ram's liquidation.

42. The Bank also fraudulently represented to Commodities, to induce it to enter into the Note and Security Agreement, that any dispute arising thereunder would be governed by New York law and be litigated in New York courts, as expressly provided in the Note and Security Agreement, and Commodities reasonably relied upon this material representation in entering into the Note and Security Agreement. As a result of its reliance upon the Bank's representations, Commodities has been seriously damaged, as fully described in Counts I and II, above, by the Bank's unauthorized institution of liquidation proceedings against it in Israel under Israeli law.

43. By reason of the foregoing, this Court should award compensatory damages in the amount of $100,000,000, including the amount of $35,000,000, representing Ram's indebtedness to Commodities which has still not been paid, including the loss of Commodities' own working capital invested in the Ram Steel Billet Transaction, and award punitive damages in a like amount, plus attorney's fees and costs incurred to prosecute this action.

FOURTH CLAIM

(Interference with Advantageous Business and Economic Relations)

44. Commodities and Holdings repeat and reallege paragraphs 1 through 43, above, as if fully set forth herein.

45. By its conduct fully described above, ABN-AMRO Bank, including through its counsel, knowingly and willfully interfered with Commodities' and Holdings' advan-

tageous business and economic relations, including their ability to fully conduct and promote thier business activities and to protect and preserve their financial interests and assets abroad.

46. In particular, the Bank, with knowledge of Commodities' contract with Ram and its (Commodities') intent to apply for appointment as receiver of Ram, Commodities being Ram's largest secured creditor, engaged in fraudulent conduct by misrepresenting to Commodities that it supported Commodities' application for appointment as *receiver* of Ram and then appearing at the Ram Israeli court proceeding and failing to support such appointment and instead asserted claims against Ram arising out of the Note and Security Agreement—even though the Bank had no contract with Ram and even though there was no default under those agreements. As a direct result of the Bank's conduct, the Israeli Court denied Commodities' application for appointment as receiver of Ram and ultimately liquidated Ram, thereby seriously harming Commodities' prospective economic advantage and interfering with Commodities' right to repayment of Ram's indebtedness under its contract with Ram. Ram's liquidation precluded Ram's loans being repaid by profits generated from Ram's continued operation under receivership as proposed by Commodities, thus making it impossible for Commodities to receive payment from Ram and, in turn, to continue to fully perform its obligations under its Loan Agreement with the Bank, as well as its obligations to other lending banks.

47. Regarding Holdings, the Bank, through its counsel, Mr. Shavit, appointed by the Israeli court as Interim Liquidator for Holdings, with knowledge of the existence of a property asset belonging to Holdings, intentionally and fraudulently interfered with an advantageous business relation and in particular, a real estate asset of Holdings, to wit: an office industrial building located at 31 Alufsade Street, Givatim, Israel, which Mr. Shavit permitted a

creditor, Bank Leumi, to foreclose upon, and further waived any of Holdings' rights to recourse, even though Holdings had fully performed under it loan agreement with Bank Leumi, resulting in Holdings' loss of this valuable asset. The Bank has also recently applied for, and obtained, on February 6, 1995, from the Israeli court, permission to liquidate and sell another office building belonging to Holdings located at Jerusalem Boulevard, Jaffa, Israel, which sale has not yet taken place.

48. By reason of the foregoing, this Court should award compensatory damages in the amount of $100,000,000, punitive damages in like amount, plus attorney's fees and costs incurred to prosecute this action.

FIFTH CLAIM

(Conversion and Trespassory Taking)

49. Commodities and Holdings repeat and reallege paragraphs 1 through 48, above, as if fully set forth herein.

50. By its conduct fully described above, ABN-AMRO Bank converted and unlawfully took property belonging to Commodities and Holdings as fully described above, including, but not limited to the office industrial building located at 31 Alufsade Street, Givatim, israel, which Mr. Shavit permitted a creditor, Bank Leumi, to foreclose upon, even though Holdings had fully performed under its loan agreement with Bank Leumi, resulting in Holdings' loss of this valuable asset. The Bank has also recently applied for, and obtained, on February 6, 1995, from the Israeli court, permission to liquidate and sell another office building belonging to Holdings located at Jerusalem Boulevard, Jaffa, Israel, which sale has not yet taken place. Further, Holdings was in no way indebted to the Bank under Commodities' Note and Security Agreement.

51. By reason of the foregoing, this Court should award compensatory damages in the amount of $100,000,000,

punitive damages in like amount, plus attorney's fees and costs incurred to prosecute this action.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court order the following relief:

(1) judgment be entered in favor of Commodities and against ABN-AMRO Bank in the amount of $100,000,000 on Claims 1, 2, 3, 4 and 5, respectively, for compensatory damages, and in like amount for punitive damages on each claim, plus interest accrued and accruing thereafter, plus other charges and expenses, including attorney's fees and the costs incurred to prosecute this action;

(2) judgment be entered in favor of Holdings and against ABN-AMRO Bank in the amount of $100,000,000 on Claims 4 and 5, respectively, for compensatory damages, and in like amount for punitive damages, plus interest accrued and accruing thereafter, plus other charges and expenses, including attorney's fees and the costs incurred to prosecute this action;

(3) declaratory judgment be entered declaring the rights and liabilities of the parties with respect to the forum and choice-of-law clause of the Note and Security Agreement, including a declaration that the Israeli court's appointment of the Bank's counsel, Ilan Shavit, as Interim Liquidator of Commodities and Holdings, was null and void because in contravention of the express terms of the Note and Loan Agreement, which required that New York law and New York courts govern any dispute of the parties, and restraining any further proceedings by the Bank or its counsel, Mr. Shavit, under the Israeli court's appointment of Mr. Shavit as Interim Liquidator of Commodities and Holdings; and

(4) such other relief as the Court may seem just and proper.

THE PLAINTIFFS FURTHER DEMAND A TRIAL BY JURY ON ALL COUNTS OF THE COMPLAINT.

Dated: New York, New York
June 30, 1995

GALLET DREYER & BERKEY, LLP

By /s/ David L. Berkey
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EX. A

PROMISSORY NOTE

Grid—Offering Basis—Corporation

USD 15,000,000
(Amount of Facility)

New York, New York
June 1, 1990

FOR VALUE RECEIVED, Red Rock Commodities, Ltd. (the "Borrower"), a (corporation) (partnership) organized and existing under the laws of Delaware, hereby promises to pay to the order of Algemene Bank Nederland N.V., New York Branch (the "Bank"), in lawful money of the United States of America, in care of its New York office located at 335 Madison Avenue, New York, New York 10017, on the date or dates agreed to by the Borrower and the Bank in accordance with the provisions thereof, or, if no such agreement is reached, ON DEMAND, or, if not such agreement is reached and no demand is made, five years from the date hereof, the principal sum of Fifteen Million or, if less, the unpaid principal amount of all loans or advances (hereinafter, "Loans") made by the Bank to the Borrower or in accordance with its instructions.

The Borrower promises also to pay interest on the unpaid principal amount hereof in like money at said office from the date hereof at such rates as shall be agreed upon from time to time between the Borrower and the Bank, such interest to be payable on the last business day of each calendar month, commencing on the first such date to occur after the date hereof, at maturity, after maturity on demand, and on the date of any payment herein on the amount paid. The Borrower acknowledges that interest rates and maturity dates are ordinarily negotiated between the Borrower and the Bank by telephone and agrees that in the event of any dispute as to any applicable interest rate and/or maturity date, the determination of the Bank and its respective entry on the

schedule hereinafter referred to shall be conclusive and binding upon the Borrower. Unless otherwise specifically agreed, interest will be calculated on the bank basis, that is, on the basis of the actual number of days elapsed divided by 360.

Demand of payment of this Note shall be sufficiently made upon the Borrower by written, telex, telegraphic or telephonic notice given by or on behalf of the Bank to the Borrower at its last known address. The Borrower hereby expressly waives presentment, protest and other demand or notice of any kind. No delay on the part of the Bank in exercising any of its options, powers or rights, or partial or single exercise thereof, shall constitute a waiver thereof.

At the time of the making of each Loan and at the time of each payment of principal thereon, the holder hereof shall make a notation on the schedule annexed hereto of the date and amount of the related Loan or payment, as the case may be, and, in the case of a loan, of the interest rate applicable thereto and the maturity date thereof (such maturity date to be noted as "ON DEMAND" or a specific date, which date shall be a business day and shall be not more than ninety days form the date of the Loan to which it relates); provided, however, that the failure to make such a notation with respect to any Loan shall not limit or otherwise affect the obligation of the Borrower hereunder with respect to such Loan or any other obligation of the Borrower relating to such Loan, and payments of principal hereon by the Borrower shall not be affected by the failure to make a notation thereof on said schedule. Despite the date of this Note, interest hereon shall be payable only from the dates of the respective Loans evidenced hereby and despite the stated amount hereof, this Note shall be enforceable, with respect to the Borrower's obligation to pay the principal amount hereof, only to the extent of the unpaid aggregate amount of Loans made by the Bank.

The Borrower shall have the right to prepay this Note in part (or integral multiples of $100,000) or in full at

any time without any premium or penalty. Each prepayment of principal shall be accompanied by payment in full of all interest accrued on the amount so prepaid.

This Note shall be governed by and construed in accordance with the law of the State of New York.

RED ROCK COMMODITIES, LTD.

Type or Print Name of Borrower

By /s/ [Illegible]

Title Executive Vice President

EX. B

SPECIFIC SECURITY AGREEMENT

New York, New York
June 1, 1990
(Date)

Algemene Bank Nederland N.V.
335 Madison Avenue
New York, New York 10017

Gentlemen:

In order to induce you (hereinafter called the "Bank") to extend or to continue to extend credit, from time to time, to Red Rock Commodities, Ltd. *(Insert name of Borrower)*, a corporation having an office at 475 Montauk Highway, West Islip, N.Y. *(Insert location of Borrower's principal office)* hereinafter called the "Borrower"), and to supplement the Terms and Conditions dated ———— ———— *(Insert date of Terms and Conditions)* between the Bank and the Borrower, the Borrower hereby represents and agrees with the Bank as follows:

1. Subject to the terms and provisions of this agreement, the Bank will henceforth make or continue loans to the Borrower as the Bank elects, from time to time. In consideration of the receipt or continuation of such loans and as security for the payment of all liabilities to the Bank, the Borrower hereby assigns and grants to the Bank a security interest in the following described property, hereinafter called "Collateral".

2. Definitions: as used herein:

   (a) *"Collateral"* means all personal property of the Borrower, wherever located, now owned or in existence or hereafter acquired or created, which is, or shall be financed by the Bank or is in, or shall come into the Bank's possession or

control, including, without limitation, inventory, farm products, equipment, documents (including any documents made available to the Borrower pursuant to trust receipts or other security agreements) and accounts receivable, and the products and proceeds thereof, together with all improvements and additions thereto, whether same be money, deposits, accounts, chattel paper, instruments, notes, securities, bonds, drafts, acceptances, contract rights, general intangibles or proceeds of insurance.

(b) "*Liabilities*" means all indebtedness, obligations and liabilities of the Borrower to the Bank of every kind and description, direct or indirect, absolute or contingent, due to or to become due, contractual or tortious, now existing or hereafter arising, including without limitation liabilities as a guarantor or endorser, regardless of how they arise or by what agreement or instrument they may be evidenced or whether evidenced by any agreement or instrument.

(c) "*Inventory*" means goods, merchandise and other personal property now owned or hereafter acquired by the Borrower, including but not limited to *(insert description of primary line(s) of merchandise)*:

which are held for sale or lease or being processed for sale or lease in Borrower's business as now or hereafter conducted, including without limitation all materials, goods in process and finished foods, as well as supplies customarily classified as inventory.

(d) "*Accounts Receivable*" means accounts, notes, drafts, acceptances and other forms of obligations and receivables owing to the Borrower. The Borrower hereby represents and warrants as to each Account Receivable, as so defined,

that it meets (if now existing) or will meet (if hereafter arising) the following specifications at its inception and will continue to meet the same until it is collected in full.

(1) It represents a bona fide money obligation of the obligor (the "account debtor") owing to the Borrower in the amount stated to the Bank.

(2) The account arises from a bona fide sale or lease of goods to, or performance of services for, the account debtor by the Borrower.

(3) The account is not subject to any assignment, claim, lien or security interest of any character except the security interest of the Bank and is not subject to any claim for credit, set-off, allowance or adjustment, or counterclaim of any person.

(4) No notice of bankruptcy, insolvency or adverse change in the financial condition of the account debtor has been received by the Borrower.

3. The Borrower shall furnish the Bank information adequate to Inventory, Accounts Receivable, Contract Rights and other Collateral financed, or being financed, by the Bank at such times and in such form and substance as may be requested by the Bank, including but not limited to title documents and/or trust receipts. The Borrower will also, upon request, deliver to the Bank shipping and delivery receipts evidencing the shipment of goods and invoices evidencing the receipt of, and payment for, all Inventory. All balance sheets, earning statements and other financial data which have been or may hereafter be furnished to the Bank to induce it to enter into this agreement or in connection herewith, do or shall fairly represent the financial condition and operations of

the Borrower as of the dates and for the periods shown thereon and all other information, reports, papers, and data furnished to the Bank are or shall be, at the time furnished, accurate and correct in all material respects and complete insofar as completeness may be necessary to give the Bank a true and accurate knowledge of the subject matter. The Borrower will not sell, encumber, or otherwise dispose of Collateral except in the ordinary course of business without the written consent of the Bank.

Without the prior written consent of the Bank the Borrower will not file or authorize or permit to be filed in any jurisdiction any financing statement or like statement in which it is named a debtor and the Bank is not named as the secured party. The Borrower hereby authorizes the Bank at the Borrower's expense to file any financing statement deemed necessary by the Bank to perfect the security interests herein specified, and to sign the same in the name and on behalf of the Borrower as attorney-in-fact, if necessary. A carbon, photographic or other reproduction of this agreement or any financing statement signed as provided above shall be sufficient as a financing statement for such filing purposes as the Bank may deem necessary.

At any time and from time to time, upon the demand of the Bank, the Borrower will also deliver and pledge to the Bank, endorsed and/or accompanied by such instruments of assignment and transfer in such form and substance as the Bank may request, any and all instruments, securities, documents and/or chattel papers as the Bank may specify in its demand.

4. The Borrower will, at all times, maintain at 475 Montauk Highway, West Islip, N.Y. *(Insert precise address of Borrower's office or principal place of business)*, which the Borrower hereby represents to be the location of its sole place of business or, if it has more than one place of business, its chief executive office, accurate books

and records covering the Collateral. Immediately upon the execution of this agreement, the Borrower will mark all such books and records with an entry showing the absolute assignment effected hereby and the Bank hereby is given the right and privilege of auditing the books and records of the Borrower relating to said Collateral and to inspect the Collateral at any time, and from time to time as the Bank deems proper.

5. Except for the security interest granted hereby and by the Terms and Conditions the Borrower is, and as to Collateral hereafter becoming such, shall be, the owner of the Collateral free from any lien, security interest or encumbrance, and the Borrower shall defend the Collateral against all claims and demands of all persons at any time claiming the same or any interest therein adverse to the Bank's.

6. The Borrower shall give the Bank written notice of each office of the Borrower at which records pertaining to Collateral are or will be kept, of each location at which inventory is or will be kept, of each location of its sole place of business or chief executive office, and of any change in said office, offices, place of business, location or locations. Except as such notice is given, all records of the Borrower pertaining to accounts and contracts are and shall be kept and the location of all inventory is and shall be at the Borrower's sole place of business or chief executive office as set forth in paragraph 4 hereof.

If at any time the Collateral shall be unsatisfactory to the Bank, upon the demand of the Bank, the Borrower will furnish such further security or make such payment on account of the Liabilities as will be satisfactory to the Bank.

7. The Borrower shall be in default under this agreement and the Terms and Conditions upon the happening of any one of the following events or conditions:

(a) There shall be a default in the due and punctual discharge of any liability or other obligation, hereunder or otherwise, to the Bank or, unless being contested in good faith as determined by the Bank, any other creditor or supplier of the Borrower;

(b) Any wararnty, representation or statement made or furnished to the Bank by or on behalf of the Borrower, herein or otherwise, proves to be false or incorrect in any material respect; or in any event described in section VI of the Terms and Conditions shall have occurred;

(c) The Borrower shall fail to keep the Collateral fully insured, with proceeds of insurance payable to the Bank, without prior written consent of the Bank; or

(d) The making or sending Notice of any intended bulk sale of the business of the Borrower shall occur.

Upon such default and at any time thereafter, (a) the Liabilities shall become immediately due and payable without notice, demand of payment or presentment, all of which are hereby expressly waived, and (b) the Bank may proceed to enforce payment of the same and exercise any and all of the rights and remedies provided by the Uniform Commercial Code, the Terms and Conditions and all other rights and remedies possessed by the Bank. The Bank shall be entitled to the immediate possession of the Collateral and all books and records pertaining thereto at such place or places as the Bank may specify, and it shall have the authority to enter upon any premises on which the same may be situated and remove the same therefrom. The Bank may at any time, in its discretion, transfer any of the Collateral or evidence thereof into its own name or that of its nominee and receive the proceeds therefrom and hold the same as security for Liabilities

or apply it on principal or interest due thereon and/or it may, without advertisement, sell at public or private sale, grant options to purchase or otherwise realize upon, the whole or any part of the Collateral. If notice of any sale or other disposition is required by law to be given, the Borrower hereby agrees that a notice sent to the Borrower's last known business address by ordinary mail at least ten business days before the time of any intended public sale or of the time after which any private sale or other disposition of the Collateral is to be made, shall be reasonable notice of such sale or other disposition. The Bank may demand, collect, receipt for, settle, compromise, adjust, sue for, foreclose, or realize upon Collateral, in its own name or in the name of the Borrower, as the Bank may determine. The Bank shall not be liable for the failure to collect any account or enforce any contract right or general intangible or for any act or omission on the part of the Bank, it officers, agents or employees, except for willful misconduct.

With respect to the Collateral, the Bank shall be under no duty to send notices, perform services, vote, pay for insurance, taxes or other charges or take any action of any kind in connection with the management thereof and its only duty with respect thereto shall be to use reasonable care in its custody and preservation while in its possession, which shall not include any steps necessary to preserve rights against prior parties.

8. The Borrower shall be liable for and agrees to pay to the Bank any and all expenses incurred or paid by the Bank in protecting or enforcing its rights under this agreement, including but not limited to attorneys' fees and expenses, and such expenses shall be "Liabilities" as defined herein. The rights and duties of the parties hereto shall be cumulative of and not in substitution for or exclusive of the rights and duties incurred under the Terms and Conditions; said Agreement and this agreement shall be construed together and read as one single agreement, each being hereby incorporated into the other

by reference. Each shall be read consistently with the other unless the context otherwise clearly requires. In any case of irresolvable conflict, the terms of this agreement shall prevail.

9. No waiver by the Bank of any default shall operate as a waiver of any other default and the terms of this agreement shall be binding upon the legal representatives, administrators, successors, and assigns of the parties hereto.

10. Unless hereinbefore specified to the contrary all notices may be given by leaving same at the address given herein or any other address hereafter filed with the Bank, or by mailing same to such address with the same effect as if delivered to the Borrower personally. Such notice given in the manner herein provided shall be effective whether or not received by the Borrower.

11. This agreement shall be construed in accordance with and governed by the laws of the State of New York, without regard to its principles of choice of law or conflicts of law. Unless the contest otherwise requires all terms used herein shall have the meaning specified in the Uniform Commercial Code as in effect on the date hereof in the State of New York.

Signed and delivered the day and year first above written.

RED ROCK COMMODITIES, LTD.

Name of Borrower

By /s/ [Illegible]
Authorized Signatory

ACCEPTED AND AGREED:

ALGEMENE BANK NEDERLAND N.V.
NEW YORK BRANCH

By /s/ [Illegible] By /s/ [Illegible]

EX. C.

TERMS AND CONDITIONS

Algemene Bank Nederland N.V.
335 Madison Avenue
New York, NY 10017

In consideration of loans or other financial accommodations given or to be given, or continued, to the undersigned by Algemene Bank Nederland N.V. (hereinafter called the "Bank"), including acceptance by the Bank or any of its correspondents of any draft or drafts drawn on the Bank or on any of its correspondents by the undersigned or by persons designated in writing by the undersigned, the undersigned hereby agree(s):

1. The Term "liabilities" as herein used shall include all liabilities of any kind of the undersigned, whether direct or contingent, joint or several, or joint and several, secured or unsecured, now or hereafter existing, due or to become due to, or held by, the Bank for its own account or as agent for another or others, whether created directly or acquired by assignment or otherwise, including, without limiting the generality of the foregoing, liabilities to the Bank of the undersigned as a member of any partnership, syndicate, association or other group, incurred as a result of the Bank's acting upon the instructions of the undersigned, whether delivered in person or by telephone, orally or in writing, or the Bank's acting as a guarantor to procure the release of goods shipped or released to the undersigned or others, or, arising by operation of law, by contract or in tort, whether such liabilities are liquidated or unliquidated, at law, in equity, and whether hereto or hereafter incurred or given by the undersigned as principal, surety, endorser, guarantor, accommodation party or otherwise.

The term "collateral" as herein used shall include:

(a) the balance of every account of the undersigned with the Bank and any other claim of the undersigned against the Bank, now or hereafter existing, and all money, instruments, securities, documents (including the goods covered thereby), chattel paper, credits, claims, demands, or any interest in any thereof, and any other property, rights and interests, of the undersigned, or any evidence thereof, which at any time shall come into the possession or custody or under the control of the Bank or any of its agents, associates, branches or correspondents, for any purpose, whether or not accepted for the purpose or purposes for which they are delivered or intended, and shall include any of the foregoing from time to time made available to the undersigned by the Bank pursuant to a trust receipt or other security agreement the effect of which is to continue the Bank's security interest therein and shall also include the proceeds, products and accessions of and to each of the foregoing, and the Bank shall be deemed to have possession, control or custody of any of the collateral actually in transit to or set part for it or any of its agents, associates, branches, affiliates, correspondents or others acting in its behalf; and

(b) all substitutions for the properties, rights and interests described in (a) above, all additions thereto (including without limitations all cash and dividends and other distributions and all rights, privileges and options relating to, declared or granted in connection with such property) and the products and proceeds thereof.

The term "undersigned" as herein used shall mean the parties who have signed this agreement and each of them.

II. Unless otherwise agreed in writing all liabilities shall bear interest (a) if the undersigned is a corporation or if the aggregate amount of all liabilities is equal to or greater than $250,000, or its equivalent, at the rate of 25% per annum, and (b) otherwise, at the rate of 16%

per annum (or, if less, at the maximum rate per annum permitted by applicable law) to the date of payment and shall be payable, upon demand, in lawful money of the United States at the Bank's principal place of business in New York City. The Bank may, but shall not be obligated to, charge such lower rate of interest as it may, in its discretion, deem acceptable. Acceptances payable in United States currency shall be paid at the Bank's principal place of business in New York City at maturity in same day funds.

The undersigned will also pay all commissions payable to the Bank and all charges and expenses paid or incurred by the Bank in connection with loans, acceptances, collections or other financial accommodations, plus correspondents' charges, if any.

III. As security for the payment of any and all the liabilities the undersigned hereby grant(s) to the Bank a security interest in and a general lien upon and/or right of set-off of the collateral. The right is herewith expressly granted to the Bank, at its option, at any time and from time to time, without notice, to transfer or cause to be transferred to, or registered in the name of, itself or its nominee(s), any and all stocks, bonds and other securities and property included in the collateral, and, whether or not so transferred or registered, to receive any and all income and dividends thereon, including stock-dividends and rights to subscribe, and to hold the same as a part of the collateral and/or to apply it to the reduction or liquidation of any of the liabilities, at its discretion to exchange all or any of the collateral for other property upon reorganization, recapitalization or other readjustment of any corporation and in connection with any such reorganization, recapitalization or readjustment to deposit all or any of the collateral with any committee or depositary upon such terms and conditions as it may determine, after such transfer or registration, to vote or cause its nominee(s)

to vote all or any of such stocks, bonds and securities, and to exercise or cause its nominee(s) to exercise all or any powers with respect to any stocks, bonds or other securities or property forming a part of the collateral, with the same force and effect as an absolute owner thereof, all without notice and without notice and without liability to any person except to account for property actually received by it. The Bank may at its option remove any and all of the collateral from the state or country in which it may at any time be held to any other state or country, and it may there be dealt with by the Bank as provided in this agreement.

IV. This agreement is a "security agreement" within the meaning of the Uniform Commercial Code. The undersigned hereby:

(a) authorizes the Bank to file this agreement or any statement, instrument, document, amendment or other paper, without the signature of the undersigned, in all public offices as the Bank in its sole discretion may deem necessary to create, preserve, perfect or validate any lien or security interest or to enable the Bank to exercise or enforce its rights with respect to such lien or security interest and agrees to pay the cost of filing or recording the same and all other costs and expenses in connection with the custody, care, preservation, perfection or collection of the collateral;

(b) undertakes to execute and deliver or file at the request of the Bank any statement, instrument, document or other paper in such form and substances as the Bank may request in order to create, preserve, perfect or validate any lien or security interest or to enable the Bank to exercise or enforce its rights with respect to such lien or security interest;

(c) undertakes to deliver as part of this agreement a list of all financing statements or security agreements relating to any of the undersigned's property executed

prior to the execution and delivery of this agreement and which are in effect at the time of such execution and delivery;

(d) so long as any liability of the undersigned to the Bank remains outstanding the undersigned undertakes to deliver a written notice to the Bank promptly upon and contemporaneously with the entering into of any security agreement with or execution of any financing statement in favor of a party other than the Bank.

V. The Bank may, in its discretion, whether or not any of the liabilities be due, apply any amount(s) which may be received or held by it hereunder at any time(s) to the payment or reduction, either in whole or in part, of the principal and/or interest (as the Bank may elect) then owing on any or all of the liabilities, in its name and/or in the name of anyone for whom it has acted or shall act as agent in connection with any such liability. In cases where the Bank undertakes to collect any instrument for the account of the undersigned, the Bank shall comply with Section 4-202 of the Uniform Commercial Code. The Bank shall not otherwise be bound to take any steps to preserve any rights against prior parties in any of the property or documents of the undersigned, all of which the undersigned undertakes to do. Except as hereinabove provided, as to all instruments, documents or other property delivered by or on behalf of the undersigned to the Bank, whether for security hereunder, collection or other disposition, the Bank shall not be responsible for: (a) any loss, cost or expense incurred in connection therewith; (b) any default, neglect, malfeasance, suspension or insolvency of any correspondent or agent to whom any document, draft or other obligation may be entrusted for any purpose whatsoever, (c) any loss or delay in transmission or otherwise of any such document, draft or obligation or of the proceeds thereof; (d) any error, omission, interruption or delay in the

transmission or delivery of any pertinent message, by mail or otherwise; or (e) any loss in exchange or loss of interest. In addition, even though not obligated to do so, the Bank may (1) demand, sue for, collect or receive any money or property at any time due, payable or receivable on account of or in exchange for any obligation securing any of the liabilities of the undersigned, (2) compromise and settle with any person liable on such obligation, and (3) extend the time of payment or otherwise change the terms thereof, as to any party liable thereon, all of the foregoing without incurring responsibility to the undersigned or affecting any of the liabilities of the undersigned. The Bank may, but is not obligated to, exercise any or all rights to conversion or exchange or similar rights, privileges and options relating to the collateral. In the event that the undersigned requests the Bank to act upon oral or telephonic instructions, the undersigned agrees that it shall indemnify and hold harmless the Bank and its officers and employees from and against any losses as a result of its acting or refraining from acting upon the oral instructions furnished to it hereunder which are believed by it to be genuine.

VI. Upon non-payment when due of any of the liabilities of the undersigned, or in case the Bank deems itself insecure, or upon failure of the undersigned to keep any property of the undersigned adequately covered by insurance satisfactory to the Bank, or if it appears at any time that any representation in any financial or other statement of the undersigned, delivered to the Bank by or on behalf of the undersigned, is untrue or omits any material fact, or if an adverse change shall occur in the financial condition of the undersigned, or if the undersigned or any endorser or guarantor of any of the liabilities of the undersigned shall die or (being a partnership or corporation) shall be dissolved or shall become insolvent (however evidenced), or upon the suspension of business of the undersigned, or upon the undersigned or any partner of

the undersigned (if a partnership) being expelled from or suspended by any securities or commodity exchange, or upon the issuance of any warrant, process or order of attachment, garnishment or other lien and/or the filing of a lien as a result thereof against any of the property of the undersigned, or upon the commencement of any proceeding under, or the use of any of the provisions of, the New York Civil Practice Law and Rules or the analogous provisions of the law of any other jurisdiction by any judgment creditor of the undersigned or with respect to any property of the undersigned, or upon the making by the undersigned or any endorser or guarantor of any of the liabilities of the undersigned of an assignment for the benefit of creditors, or upon a trustee or receiver being appointed for the undersigned or any endorser or guarantor of any of the liabilities of the undersigned or for any of the property of the undersigned, or upon any proceedings being commenced by or against the undersigned or any endorser or guarantor of any of the liabilities of the undersigned under any bankruptcy, reorganization, arrangement, insolvency, readjustment of debt, receivership, liquidation or dissolution law or statute, then, and in any such event, (a) all liabilities shall become at once due and payable, without notice, presentment or demand of payment, which are hereby expressly waived, and (b) the Bank shall have the right, from time to time, without advertisement, demand upon or notice to the undersigned, or right of redemption by the undersigned except as shall be required by applicable statute and cannot be waived, at its option to sell, re-sell, assign, transfer and deliver all or any part of the collateral, at any brokers' board or exchange or at public or private sale, for cash or on credit or for future delivery, and in connection therewith may grant options, and may impose reasonable conditions such as requiring any purchaser to represent that any stock constituting part of the collateral is being purchased for investment purposes only. Upon each such sale, the Bank, unless prohibited by provision

of any applicable statute which cannot be waived, may purchase all or any part of the collateral being sold, free from and discharged of all trusts, claims, rights of redemption and equities of the undersigned.

VII. In the case of each such sale, or of any proceedings to collect any liabilities of the undersigned, the undersigned shall pay all costs and expenses of every kind incurred in connection therewith, including reasonable attorneys' fees, and after deducting such costs and expenses from the proceeds of any sale or collection, the Bank may apply any residuce to pay any liabilities of the undersigned, who will continue liable for any deficiency, with interest. The Bank at any time, at its option, may apply or reapply all or any of the net cash receipts from or on account of any of the collateral to the payment in whole or in part of, and may for any purpose allocate all or any of the collateral to, any or all of the liabilities, applying or reapplying or distributing or allocating the same as it shall elect, whether or not the item or items to which such payment is applied or to which such allocation of collateral is made be due, making proper rebate of interest or discount in case of payment on any item not due, the determination of the Bank in all such matters being conclusive.

VIII. The Bank may assign or otherwise transfer any or all of its rights and powers hereunder and/or any or all of the liabilities and/or any or all of the collateral and thereafter shall be fully discharged from all claim and responsibility with respect to any and all collateral so transferred. Upon any transfer of any of the liabilities of the undersigned, the Bank may retain all or any part of the collateral as security for all liabilities of the undersigned retained by the Bank.

All obligations and agreements of the undersigned to or with the Bank shall bind the heirs, executors, administrators, successors and/or assigns of the undersigned. If there be more than one undersigned, their obligations hereunder shall be joint and several.

IX. No delay on the part of the Bank and/or of any transferee in exercising any power or right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any power or right hereunder preclude other or further exercise thereof or the exercise of any other power or right, nor shall the Bank be liable for exercising or failing to exercise any such power or right. The undersigned hereby waive(s) presentment (except for acceptance when necessary), protest, notice of protest and notice of dishonor of any and all drafts, notes, bills of exchange, checks and other instruments included in the liabilities or the collateral, or herein mentioned, whether upon inception, maturity, acceleration of maturity or due date or at any other time, and any and all other notice and demand whatsoever, whether or not relating to such instruments.

X. This is a continuing agreement, applying to all future as well as existing transactions, whether or not of the character contemplated at the date of this agreement, and if all transactions between the Bank and the undersigned shall be at any time or times closed, they shall be equally applicable to any new transactions thereafter; they shall so continue in force notwithstanding any change in any partnership party hereto, whether such change occurs through death, retirement or otherwise. The provisions hereof may not be modified, changed, waived, discharged or terminated orally, but only by an instrument in writing signed by the party against whom enforcement of the modification, change, waiver, discharge or termination is sought; and each such waiver, if any, shall apply to the specific instance invoked, and shall in no way impair the rights of the Bank or the obligations of the undersigned to the Bank in any other respect at any other time. The options, powers, remedies and rights of the Bank specified herein are in addition to those otherwise created or provided by law; and the provisions of this agreement shall apply to any other agreement (if any) heretofore or hereafter entered into by the undersigned

in favor of the Bank with the same force and effect as though incorporated therein, except to the extent that any provision hereof is in direct conflict with any provision of any such other agreement.

XI. This General Liability Agreement is also sometimes called a Loan and Security Agreement. Any reference in any other instrument, agreement or document to a Loan and Security Agreement between the undersigned and the Bank, or to the Bank's form of Loan and Security Agreement, shall be deemed a reference to this General Liability Agreement.

XII. This agreement shall become effective upon being executed by the undersigned and it and the rights and obligations of the Bank and of the undersigned hereunder shall be governed by and construed in accordance with the laws of the State of New York. Any suit, action or proceeding against the undersigned with respect to this agreement may be brought in the Supreme Court of the State of New York, County of New York or in the United States District Court for the Southern District of New York and the undersigned hereby irrevocably submits to the jurisdiction of such courts for the purpose of any such suit, action or proceeding and consents to the service of process in any such suit, action or proceeding by personal delivery or by the mailing thereof by the Bank by registered or certified mail, return receipt requested, postage prepaid, to the address specified in the records of the Bank, such service of process by mail to be deemed effective on the fifth day following such mailing. The undersigned agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in any manner provided by law.

RED ROCK COMMODITIES LTD.

/s/ [Illegible]

New York, N.Y., June 1st, 1990

GUARANTY

In consideration of any existing indebtedness or other liability on the part of any one or more of the parties or any successors in interest thereof to annexed General Liability Agreement (hereinafter called the "Agreement") to ALGEMENE BANK NEDERLAND N.V. ("hereinafter called the "Bank"), and/or of the making by said Bank of any loan or other grant or extension of credit under or pursuant to the provisions of the within Agreement to any one or more of said parties, and for other valuable consideration, the undersigned hereby (jointly and severally) absolutely and unconditionally guarantee(s) to said Bank, its successors and assigns, the full and punctural payment when due by the terms hereof of any and all of the "liabilities" (as defined in the within Agreement) irrespective of the validity, regularity or enforceability thereof and hereby assent(s) to all the terms and conditions of the said Agreement, and consent(s) that all or any of the "collateral" (as defined in the within Agreement) for all or any such "liabilities" may be exchanged or surrendered at any time(s), and that the time(s) of payment for all or any part of the said "liabilities" may be extended, without notice to or further assent from the undersigned, who will remain bound upon the guaranty notwithstanding any such exchange, surrender or extension.

As security for the obligations of the undersigned hereunder the undersigned hereby grants to the Bank a security interest in and a general lien upon and/or right of set-off of any and all balances of every account, wheresoever situated, of the undersigned with the Bank and any other claim of the undersigned, now or hereafter existing, and any other property, rights and interests of the undersigned, which at any time shall come into the possession, custody or control of the Bank or any of its agents associates, branches or correspondents, and the proceeds thereof. In the event of default hereunder the Bank shall have all the same rights and remedies with

respect to the property of the undersigned which the Bank has on the strength of Articles III though IX of the within Agreement with respect to the collateral.

Notice of the acceptance hereof and of the making of any loan or other grant or extension of credit under or pursuant to the provisions of the said Agreement, and promptness in making any demand hereunder or in demanding or enforcing payment of any of the said "liabilities" hereby guaranteed, are hereby waived. The undersigned also hereby waives presentment, protest and notice of protest or dishonor of any evidences of indebtedness hereby guaranteed.

This guaranty, which is binding upon the undersigned heirs, successors and assigns, is a guaranty of payment and not of collection. It shall be construed in accordance with the laws of the State of New York. The undersigned hereby makes the same submissions to jurisdiction and consents to service of process by the same procedures as are set forth in Section XII of the Agreement. This is a continuing gauranty which shall remain in force until a notice written by the undersigned, revoking or modifying the same, shall have been received by the Bank, but no such notice shall operate to release the undersigned from any liability in respect of accommodations granted at any time prior to receipt by the Bank of such notice.

Dated, New York, N.Y., the ——— day of ———— ————, 19—.

_____

_____

EX. D

[RRC Logo]

RED ROCK COMMODITIES LTD.
120 West 45th Street • New York, NY 10036
(212) 921-2100 Fax (212) 921-2870

August 27, 1992

Mr. Paul Feldman
Vice President
ABN AMRO Bank N.V.
500 Park Avenue
New York, N.Y. 10022

Dear Paul:

Notwithstanding your letter of earlier today, I am writing to express my dismay and regret of the actions of your attorney/representative at the conference of Creditors of RAM before the Israeli court on Sunday, August 23, 1992.

As you know, I personally took great care to keep you and other steel lending banks advised last week with respect to this matter. I was fully open with you and suggested the manner in which I believed both Red Rock's banks (including ABN) and our positions would be maximized. You were supportive of the plan, and you were well aware of the need to present a united front. I cautioned you that interference with our plan on the part of ABN could adversely affect the interest of ABN, Red Rock and Red Rock's other steel lending banks. At no time during these discussions did you advise me that ABN would be sending its own representative to the conference.

Out of nowhere and without any prior warning, your attorney/representative totally astonished us when he demanded that he be appointed *liquidator* (not "*receiver*" but "*liquidator*"). As you are well aware, the appoint-

ment of a liquidator results in a bankruptcy proceeding which would have jeopardized Red Rock's secured position. Needless to say, if Red Rock is unsecured so would ABN and the other steel lending banks. Accordingly, the action of your representative was contrary to the best interest, not only of ABN and Red Rock, but also the other lending banks. I cannot conceive of any reasonable rationale for such actions by your representative.

I understand that the judge was initially favorably disposed to our plan as unlike your representative, he desired to find a way to keep RAM operating. Although the court did not follow your representative's devastating argument, there is no question that the disposition of the court changed as our united front collapsed. . . .

At this time, it is both necessary and unfortunate that I have to place you on notice that the action of your representative has adversely affected both our steel lending banks (including ABN) and Red Rock and hold you responsible for any consequences resulting from his actions. In light of this unfortunate incident, I feel that it is necessary that Red Rock defer any reduction in the steel billet loan until we arrive at a better understanding as to how we will collectively act to maximize our positions and avoid further misunderstandings in a delicate situation.

With reference to your letter dated August 25, 1992, let me answer questions 1 and 3 by saying we will provide you with the documentation as soon as it is available. Regarding question 4, we are not now in a position to offer any substitute collateral. Before I answer question 2, I would like to ask you this question which is very relevant to this issue: What is the line facility that ABN will commit to Red Rock for its ongoing business so that Red Rock would be able to continue its strong operating cash flow and from that cash flow satisfy the steel lending banks? Based on your answer to my question, I will answer question 2.

To the extent your letter of today confirms your desire to work cooperatively, I look forward to working with you in a fashion which will be mutually beneficial to our respective interests in the RAM matter as well as the other steel lending banks. In this respect, Red Rock has already engaged counsel in many countries to prosecute claims for our mutual benefit and our general counsel is coordinating these efforts. Any further assistance would of course be appreciated, but I strongly urge that all steps be coordinated through our general counsel to avoid duplication and conflicts of interest of the type that occurred last Sunday. Upon my return to New York, I look forward to personally meeting with you and your management to discuss all of our outstanding business, including a schedule to reduce the steel billets line.

Very truly yours,

/s/ Menachem Pri-Har
MENACHEM PRI-HAR
President

MPH/kl

cc: Mr. Paul L. Harinstein
Sr. Vice President

John P. Guiton, Esq.
Vice President & Legal Counsel

Michael Faltischek, Esq.
Ruskin, Moscou, Evans & Faltischek

No. 96-1227

Supreme Court, U.S.
FILED
MAR 5 1997

In The

Supreme Court of the United States

October Term, 1996

RED ROCK COMMODITIES, LTD. and RED ROCK HOLDINGS, LTD.,

Petitioners,

vs.

ABN-AMRO BANK, N.A.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RUSSELL E. BROOKS
Counsel of Record
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QUESTIONS PRESENTED

1. Did the court below err in affirming a district court's decision dismissing a second amended complaint on the grounds that (i) a loan contract that included, among other things, a clause providing that suit "may be brought" in federal and state courts in New York did not prohibit the lender bank from commencing legal proceedings in Israel following the theft of the lender bank's collateral in Israel, and (ii) the petitioners had failed to state legally sufficient common law claims based on the bank's actions in Israel?

2. Did the court below err in finding that a district court had acted within its discretion in denying leave for petitioners to file a fourth complaint after they had repeatedly failed to cure the deficiencies of their pleadings?

STATEMENT UNDER RULE 29.6

The respondent is correctly identified in the caption except that ABN-AMRO Bank, N.A. is ABN AMRO Bank N.V. The parents and non-wholly owned subsidiaries of ABN AMRO Bank N.V. are:

Stichting Prioriteit ABN AMRO Holding

Stichting Administratiekantoor ABN AMRO Holding

ABN AMRO Holding N.V.

Alpinvest Holding N.V.

CMV-Bank N.V.

Maatschappij N.V.

ABN AMRO France, Compagnie Financière

ABN AMRO Finance S.A.

Banque de Neuflize, Schlumberger

Banque Odier Bungener Courvoisier

Massonaud Fontenay Kervern S.A.

CM Capital Markets Brokerage S.A.

CIMO SIM SpA

ABM Bank S.A.

Saudi Hollandi Bank

ABN AMRO Bank (Kazakstan) Ltd.

ABN AMRO Securities (Japan) Ltd.

HG Asia Ltd.

PT ABN AMRO Finance Indonesia

ABN AMRO North America Inc.

ABN AMRO Securities (USA) Inc.

LaSalle Bank

LaSalle Bank, FSB

LaSalle Bank, NI

LaSalle National Bank

LaSalle National Corporation

LaSalle Northwest National Bank

De Surinaamsche Bank N.V.

Pacific Investment Holding N.V.

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STATEMENT OF THE CASE

This case arises out of a loan transaction in connection with which the president of petitioners Red Rock Commodities ("Red Rock") and Red Rock Holdings ("Holdings") was convicted for conspiring to defraud respondent ABN AMRO Bank N.V. ("ABN Bank"), sentenced to prison and ordered to pay restitution to ABN Bank. *United States v. Pri-Har*, No. 93 Cr. 278-01 (S.D.N.Y. filed Feb. 21, 1995) (amended judgment), *aff'd*, No. 94-1305 (2d Cir. Jan. 3, 1995) (order), *cert. denied*, 115 S. Ct. 1431, *reh'g denied*, 115 S. Ct. 2571 (1995).[1] The petitioners' primary contention in the courts below was that ABN Bank had breached its loan agreements with Red Rock by, among other things, its actions in an Israeli court to secure ABN Bank's collateral located in Israel — collateral that petitioners alleged in their complaint had been "either fraudulently consumed or disposed of" in Israel by a non-party. The second amended complaint purports to plead claims for fraud, breach of the implied covenant of good faith and fair dealing, tortious interference with business relations and "conversion and trespassory taking". The district court dismissed petitioners'

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1. In *United States v. Pri-Har*, Menachem Pri-Har, president of Red Rock and Holdings, was found guilty after jury trial on all 24 counts of a superseding indictment filed October 26, 1993, sentenced to 14 years imprisonment and 5 years probation and ordered to pay $39 million in restitution to ABN Bank and others and $1 million in fines. (Copies of the superseding indictment, the amended judgment of conviction and the order affirming the conviction are contained in the Appendix to this Brief, which is cited herein as "Resp. App. __", at 1a-39a. The petitioners' Appendix is cited herein as "A. __".)

Counts 20 and 22 of the superseding indictment charged Pri-Har with conspiracy to defraud, among others, ABN Bank by misrepresenting the status of ABN Bank's collateral in Israel. (Resp. App. 20a-25a.) The loans referred to in the superseding indictment are the same loans that are at issue in this case. (Resp. App. 21a, 25a.)

second amended complaint, in its entirety, on respondent's motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, holding that Red Rock's consent to New York jurisdiction was non-exclusive, not mandatory, and that petitioners' other claims were not legally sufficient. The district court also declined to grant petitioners leave to file a fourth complaint. The court of appeals affirmed that decision.

A. The Loan Agreement

On or about June 1, 1990, ABN Bank entered into a $15 million uncommitted credit facility with Red Rock. (Second Am. Compl. ¶ 7, A. 17a.) The facility is evidenced by a promissory note (the "Note", Second Am. Compl. Ex. A, A. 34a-36a), a security agreement (the "Security Agreement", Second Am. Compl. Ex. B, A. 37a-44a), and a terms and conditions agreement (the "Terms Agreement", Second Am. Compl. Ex. C, A. 45a-56a; collectively the "Loan Agreement").[2] Under the Loan Agreement, Red Rock borrowed approximately $10 million from ABN Bank. (Second Am. Compl. ¶ 12, A. 19a.)

Events of default under the Loan Agreement are defined in the Terms Agreement (Terms Agreement § VI, A. 50a-52a), which is incorporated into the Security Agreement (Security Agreement ¶ 7(b), A. 42a). The Terms Agreement in relevant part provides:

> Upon non-payment when due of any of the liabilities of the undersigned, *or in case the*

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2. Since the documents constituting the Loan Agreement were appended to the second amended complaint, those documents were properly considered on a motion to dismiss. *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 674 (2d Cir. 1995); *Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974); 2A James W. Moore et al., *Moore's Federal Practice*, ¶ 8.17[7] at 8-111 (2d ed. 1994).

> *Bank deems itself insecure*, . . . or if it appears at any time that any representation in any financial or other statement of the undersigned, delivered to the Bank by or on behalf of the undersigned, is untrue or omits any material fact, *or if an adverse change shall occur in the financial condition of the undersigned*, . . . then, and in any such event, (a) *all liabilities shall become at once due and payable, without notice, presentment or demand of payment, which are hereby expressly waived*. . . .

(Terms Agreement § VI, A. 50a-52a (emphasis added).) The Security Agreement further reiterates that, upon default, "the liabilities shall become immediately due and payable without notice, demand of payment or presentment, all of which are hereby expressly waived". (Security Agreement ¶ 7, A. 42a.)

The Terms Agreement contains a consent to jurisdiction that states:

> Any suit, action or proceeding against [Red Rock] with respect to [the Loan Agreement] *may be brought* in the Supreme Court of the State of New York, County of New York or in the United States District Court for the Southern District of New York and [Red Rock] hereby irrevocably submits to the jurisdiction of such courts for the purpose of any such suit, action or proceeding.

(Terms Agreement § XII, A. 54a (emphasis added).) Under the terms of the Loan Agreement, New York law is specified as the governing law. (Security Agreement ¶ 7, A. 41a-43a.)

The Loan Agreement expressly reserves to ABN Bank all rights and remedies otherwise available to it. Pursuant to the Terms Agreement, Red Rock agreed that "[t]he options, powers and rights of the Bank specified herein are in addition to those otherwise created". (Terms Agreement § X, A. 53a.) The Security Agreement specifically provides that, upon default, ABN Bank may both "proceed to enforce payment" of liabilities and "exercise any and all of the rights and remedies provided by the Uniform Commercial Code, the Terms and Conditions and all other rights and remedies possessed by the Bank". (Security Agreement ¶ 7, A. 42a.)

The Loan Agreement was entered to finance transactions that involved the purchase, shipment and sale of steel billets from Poland to Israel (Second Am. Compl. ¶¶ 9-11, A. 18a-19a), and it both provides ABN Bank with a security interest in the collateral, "wherever located", and allows ABN Bank to commence appropriate proceedings in any jurisdiction in which its collateral is located. (Security Agreement ¶¶ 2(a), 7, A. 37a-38a, 41a-43a.) The Terms Agreement states:

> [ABN Bank] may at its option remove any and all of the collateral from the state or country in which it may at any time be held to any other state or country, and it may there be dealt with by [ABN Bank] as provided in this agreement.

(Terms Agreement § III A. 47a-48a.) Moreover, upon an event of default of Red Rock, ABN Bank may, among other things, "sue for, foreclose, or realize" upon its collateral. (Security Agreement ¶ 7, A. 41a-43a.)

B. The Red Rock-Ram Transactions[3]

Red Rock alleges that it used money borrowed pursuant to the Loan Agreement to purchase steel billets to be sold in Israel to Ram Metals and Construction Industries, Ltd. ("Ram"). (Second Am. Compl. ¶¶ 9-11, A. 18a-19a.) Under the Loan Agreement, steel billets and the bills of lading to be sold to Ram were collateral for ABN Bank's loans to Red Rock. (Second Am. Compl. ¶ 11, A. 19a; Security Agreement ¶ 2(a), A. 37a-38a.) In August 1992, however, Red Rock allegedly discovered that approximately $35 million of steel billets had been "either fraudulently consumed or disposed of by Ram in violation of the agreement between Ram and [Red Rock] Commodities", and Red Rock subsequently notified ABN Bank of the alleged theft. (Second Am. Compl. ¶¶ 12, 14, A. 19a.) In response to a subsequent inquiry by ABN Bank, Pri-Har stated in a letter to it that Red Rock was "not now in a position to offer any substitute collateral". (Second Am. Compl. ¶ 19, A. 20a; Ex. D, A. 58a.) As of that time, ABN Bank had advanced loans in the approximate amount of $10 million. (Second Am. Compl. ¶ 12, A. 19a.)

The Second Amended Complaint alleges that Red Rock determined to make an application to an Israeli court presiding over the bankruptcy of Ram to be appointed Ram's receiver and that Pri-Har discussed that plan with Paul Feldman of ABN Bank and other Red Rock lenders, all of whom allegedly supported it. (Second Am. Compl. ¶¶ 15, 16, A. 19a-20a.) At a hearing

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3. In considering a motion to dismiss, a court must assume the complaint's factual assertions to be true and draw reasonable inferences in favor of the party against whom the motion is directed. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506 (1959); *Walker v. City of New York*, 974 F.2d 293, 298 (2d Cir. 1992), *cert. denied*, 507 U.S. 961 (1993). Legal conclusions couched as factual allegations should not be presumed to be true, however. *Papason v. Allain*, 478 U.S. 265, 286 (1986).

before the Israeli court on or about August 23, 1992, the Israeli court appointed another Ram creditor, Maritime Bank, as temporary liquidator of Ram. (Second Am. Compl. ¶ 18, A. 20a.) Prior to that appointment, counsel for ABN Bank allegedly had applied to the Israeli court to be appointed liquidator without first informing Red Rock. (Second Am. Compl. ¶ 17, A. 20a.)

C. The Red Rock Liquidation

In June 1993, ABN Bank applied to the Israeli court to be appointed interim liquidator of Red Rock and Holdings in Israel. (Second Am. Compl. ¶ 21, A. 21a.) On or about June 6, 1993, the Israeli court appointed ABN Bank attorney Ilan Shavit as interim liquidator. (Second Am. Compl. ¶¶ 21, 25, A. 21a, 22a-23a.)

D. The Proceedings Below

The first complaint in this case was served in November 1994. (Affidavit of Toni C. Lichstein in Opposition to Plaintiffs' Motion for Leave to Amend, sworn to July 14, 1995 ("Lichstein Aff.") ¶ 2, included in the Joint Appendix submitted to the court of appeals.) ABN Bank timely moved to dismiss that complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Lichstein Aff. ¶ 2.) Petitioners responded in February 1995 by serving their first amended complaint. Again, ABN Bank timely moved to dismiss pursuant to Rule 12(b)(6). (Lichstein Aff. ¶ 3.) Shortly thereafter, then-counsel for Red Rock and Holdings moved for leave to withdraw as counsel, and that motion was granted. (Lichstein Aff. ¶ 4.) Pursuant to a June 13, 1995 order of the district court, petitioners served their second amended complaint together with their memorandum of law opposing ABN Bank's motion to dismiss. (Lichstein Aff. ¶¶ 5, 6.) Petitioners simultaneously sought leave to serve a third amended complaint — their fourth complaint — in the

event ABN Bank's pending motion to dismiss was granted. (Lichstein Aff. ¶ 56.)

The Second Amended Complaint purported to assert five claims: (i) breach of express terms of contract (*i.e.*, the consent to New York jurisdiction); (ii) breach of implied covenant of good faith and fair dealing; (iii) fraud and misrepresentation; (iv) interference with advantageous business and economic relations; and (v) "conversion and trespassory taking".

Oral argument was heard on July 25, 1995. By Opinion and Order dated December 12, 1995 (A. 4a-15a), the district court dismissed all claims as a matter of law and denied petitioners leave to serve a fourth complaint. In so doing, the district court held, among other things, that the forum selection clause that followed the parties' consent to New York jurisdiction was permissive, not mandatory, and thus that the non-exclusive consent did not bar ABN Bank from acting in Israel to protect its collateral there. The district court further held any damages allegedly stemming from ABN Bank's actions in the Ram bankruptcy were speculative. In denying leave for petitioners to serve a fourth complaint, the district court stated that petitioners had repeatedly failed to cure deficiencies in their pleadings.

In a three-paragraph order dated August 21, 1996 (A. 1a-3a), the United States Court of Appeals for the Second Circuit affirmed the district court's dismissal of petitioners' claims "for substantially the reasons given by the district court". (A. 1a-2a.)

REASONS FOR DENYING THE WRIT

The decision in this case does not merit further review. Petitioners now state that "[p]rocedural due process includes

the right of an American corporation to be free from domestic application of foreign judgments or proceedings, when such proceedings are commenced in a foreign court that does not have personal jurisdiction over the American corporation" (Pet. 5-6) and contend that the decision below is in conflict with cases of this Court so holding. Petitioners did not argue below, however, that due process required reversal of the district court's dismissal of their complaint. (Indeed, it does not even appear that petitioners' Questions Presented for Review by this Court encompass the new Fourteenth Amendment argument.) Petitioners' failure to raise this due process argument below is not surprising because this case is not about the "domestic application of foreign judgments or proceedings", which is the issue to which petitioners now say the Fourteenth Amendment pertains. It is apparent that petitioners have raised this constitutional "issue" for the first time in this Court merely to obscure their real grievance; namely, that the courts below did not construe the Red Rock Loan Agreement as petitioners had urged. Even were there merit in Red Rock's reading of the contract (and we submit there is none), this petition would present an issue of no general importance, and for that reason this case would still not warrant the attention of this Court. The same is true of each of the petitioners' other "make weight" common law claims as well as their challenge to the district court's refusal to permit them to serve a fourth complaint.

1. Petitioners purport to find a conflict between the decision below and decisions of this Court assertedly holding, as a matter of federal due process, that an American corporation has the right to be free from domestic application of foreign judgments when proceedings are commenced in a foreign court that lacks personal jurisdiction over the American corporation. Prior to now, Red Rock's arguments with respect to the Israeli proceedings were that (i) those proceedings were commenced by ABN Bank in violation of the Loan Agreement and in the

absence of personal jurisdiction in Israel and (ii) that ABN Bank also should be liable under the covenant of good faith and fair dealing and various common law theories for "damages" allegedly resulting from its actions in Israel. Nowhere in any of those arguments did Red Rock contend, as it now does, that federal due process had been violated. Nor did petitioners rely on any of the cases they now cite to show a conflict with decisions of this Court. Moreover, as the court of appeals noted, the fact that Red Rock's Loan Agreement is governed by New York law does not salvage its breach of contract claim. The court of appeals observed that contractual choice of law provisions "implicate substantive but not procedural law" and that petitioners had not alleged in "more than a conclusory fashion" that there were any relevant differences between New York and Israeli substantive law of liquidation and foreclosure, so that "even if substantive law were implicated, the complaint failed to state a claim on which relief could be granted". (Order, A. 2a.)

Passing all this, the Questions Presented for Review by petitioners do not even fairly encompass their eleventh hour Fourteenth Amendment argument. The Fourteenth Amendment constrains only actions by governments, and ABN Bank for that reason could not be liable for denying petitioners due process. *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). Here, the fundamental matter at issue could hardly be more particular to the parties: petitioners are seeking contract and common law damages for respondent's alleged initiation of and participation in proceedings in Israel. This is not a Fourteenth Amendment case. Even if petitioners' claims could be said somehow to implicate the Fourteenth Amendment, however, this case would still not be one in which a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court". S. Ct. R. 10(c). This concept of importance relates, of course, to

the importance of an issue "to the public as distinguished from" importance to the particular "parties" involved. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955). *See generally*, Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, Kenneth S. Geller, *Supreme Court Practice*, § 4.11 (7th ed. 1993).

2. Red Rock's real argument is that the courts below incorrectly construed the forum selection provision of the Loan Agreement. Red Rock cannot credibly maintain, however, that either the district court or the court of appeals has any *policy* against construing contract language correctly. Accordingly, Red Rock can do no more than insist that the courts below did not correctly construe the contract *in this case*.

In addition, and as a complete answer to Red Rock's challenge, the contract was correctly construed here, albeit not with the result that petitioners wished. The Loan Agreement contains a non-exclusive consent to New York jurisdiction, not a mandatory choice of forum. The Terms Agreement provides in pertinent part that suit, action or proceeding against Red Rock with respect to the Loan Agreement "*may be brought* in the Supreme Court of the State of New York, County of New York or in the United States District Court for the Southern District of New York" and goes on to state that Red Rock "irrevocably submits" to the jurisdiction of those courts for the purpose of any such suit, action or proceeding. (Terms Agreement § XII, A. 54a-55a (emphasis added).) By the use of the word "may", the Loan Agreement guaranteed that New York courts would be available as a forum to resolve disputes under the contract. It did not guarantee that those courts would be the only courts available to the parties, and the Loan Agreement reserved all other rights and remedies otherwise available to ABN Bank expressly including rights to secure ABN Bank's foreign collateral.

As the Second Circuit held in *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Importers & Distribs., Inc.*, 22 F.3d 51 (2d Cir. 1994), "an agreement *conferring* jurisdiction in one forum will not be interpreted as *excluding* jurisdiction elsewhere unless it contains specific language of exclusion". *Id.* at 53 (internal quotation marks omitted) (emphasis in original). The New York Court of Appeals has held similarly. *See Brooke Group Ltd. v. JCH Syndicate 488*, 663 N.E. 2d 635, 637 (N.Y. 1996) (clause in insurance contract, under which underwriters agreed to submit to domestic court of competent jurisdiction if underwriters failed to pay amounts due on policy and insureds so requested, was permissive in nature and did not constitute mandatory forum selection clause). *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), which petitioners cite as contrary authority, is not on point. That case involved a judgment dismissing an action on grounds of forum non conveniens, not a forum selection clause. *Id.* at 512.[4] Indeed, if contractual consent to the non-exclusive jurisdiction of a particular forum could extinguish a lender's right to take steps to secure collateral outside the specified forum, as petitioners advocate, would-be borrowers with multinational operations plainly would face higher costs of capital, if they could get loans at all.

3. The courts below also properly dismissed petitioners' other claims on the pleadings.

a. Under New York law, an implied covenant cannot

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4. The other cases cited by petitioners are equally inapposite. *600 Grant Street Associates Ltd. Partnership v. Leon-Dielmann Investment Partnership*, 681 F. Supp. 1062 (S.D.N.Y. 1988) (holding that personal jurisdiction existed but making no finding as to whether forum selection clause was exclusive); *Cambridge Nutrition A.G. v. Fotheringham*, 840 F. Supp. 299 (S.D.N.Y. 1994) (forum selection clause did not contain the word "may" or any similar language); *Babcock & Wilcox Co. v. Control Components, Inc.*, 614 N.Y.S. 2d 678 (1993) (same).

extend so far as to undermine a party's general right to act pursuant to its own interests (*see, e.g., Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 526 (2d Cir. 1994); *M/A - COM Sec. Corp. v. Galesi*, 904 F.2d 134, 136 (2d Cir. 1990)), and the second amended complaint alleges that Ram stole the collateral that secured ABN Bank's loans to Red Rock. (Second Am. Compl. ¶¶ 11-12, A. 19a.) Red Rock has never alleged, nor could it, that ABN Bank's actions in Israel were undertaken for any reason other than to preserve its own legitimate financial interests by securing the allegedly stolen collateral. Thus, ABN Bank's actions in Israel are, as a matter of law, not actionable on this theory.

b. The Second Amended Complaint alleges that, had ABN Bank not communicated that it would support Red Rock's plan to be appointed receiver of Ram, Red Rock would have abandoned that plan and instead "would have reached some other agreement or suitable accommodation with Ram for repayment of its indebtedness". (Second Am. Compl. ¶ 41, A. 28a.) All this is speculation, as is the implicit assumption that no creditor of Ram other than Red Rock would have instituted a receivership proceeding. *See, e.g., Kregos v. Associated Press*, 3 F.3d 656, 665 (2d Cir. 1993), *cert. denied*, 510 U.S. 1112 (1994).

c. At best, the petitioners' claim for tortious interference with business relations is ambiguous. The allegation appears to be that ABN Bank tortiously interfered with the steel billet contract between Red Rock and Ram. (Second Am. Compl. ¶ 46 A. 30a.) Since ABN Bank's alleged actions in the Ram bankruptcy proceeding were not alleged to be other than in support of ABN Bank's own economic interests, those actions cannot, as a matter of law, form the basis for a tortious interference claim. Under New York law, "procuring the breach of a contract in the exercise of equal or superior right is acting with just cause or excuse

and is justification for what would otherwise be an actionable wrong". *Foster v. Churchill*, 665 N.E. 2d 153, 157 (N.Y. 1996) (internal quotation marks omitted).

d. A claim for conversion will lie only with respect to personal property, not real property, and the foreclosure at issue here is of Israeli real estate. *See Boll v. Town of Kinderhook*, 472 N.Y.S. 2d 496, 498 (N.Y. App. Div. 1984). As the district court noted, "trespassory taking" is not a tort but rather an element of criminal larceny. (Opinion, A. 14a-15a (citing N.Y. Penal Law §155.05(2) (McKinney 1988)).)

4. While Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a complaint "shall be freely given when justice so requires" (Fed. R. Civ. P. 15(a)), it permits amendment only where there is no "bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Forman v. Davis*, 371 U.S. 178, 182 (1962). The standard for review of a refusal to grant leave to refile is abuse of discretion. *See Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993). Here, the district court's refusal to grant petitioners leave to file a fourth complaint is neither an issue of general importance as to which a writ of certiorari may appropriately issue nor, given petitioners' inability to file a legally sufficient complaint in three prior attempts, an abuse of discretion. *See, e.g., St. Louis Fire Fighters Assoc. Local 73 v. City of St. Louis*, 96 F.3d 323, 330 (8th Cir. 1996) (district court within discretion in denying leave to file third amended complaint when plaintiffs had already twice failed to state legally sufficient claims); *Sisseton-Wahpeton Sioux Tribe of Lake Traverse Indian Reservation, North and South Dakota v. United States*, 90 F.3d 351, 355 (9th Cir.) (same), *cert. denied*, 117 S. Ct. 516 (1996).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — SUPERSEDING INDICTMENT FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED OCTOBER 26, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S5 93 Cr. 278 (JES)

UNITED STATES OF AMERICA

- v -

MENACHEM PRI-HAR,

Defendant.

INDICTMENT

THE USDA FRAUD

COUNT ONE

The Grand Jury charges:

Introduction

1. At all times relevant to this Indictment, MENACHEM PRI-HAR, the defendant, was the President of a company called Red Rock Holdings, Inc. ("RRH"), and RRH's wholly owned subsidiary, Red Rock Commodities, Ltd. ("RRC"). RRH and RRC were headquartered at 120 West 45th Street, 24th Floor, New York, New York. In addition, RRH and RRC had branch offices in Geneva, Switzerland, and Tel Aviv, Israel.

2. At all times relevant to this Indictment, RRH engaged

in various real estate transactions within the United States, and RRC acted as a grain export company and engaged in commodities trading activities worldwide.

3. At all times relevant to this Indictment, MENACHEM PRI-HAR had control of Olges, Ltd. ("Olges"), a company located in Israel.

4. At all times relevant to this Indictment, the United States Department of Agriculture ("USDA") had in place a program entitled the Export Enhancement Program ("EEP") which allowed United States grain export companies to apply for subsidies to enable them to sell United States grain in targeted countries at prices below their costs of acquiring the grain. This program was and is administered by the Commodity Credit Corporation ("CCC"), an agency of the USDA.

5. At all times relevant to this Indictment, a United States grain exporter had to satisfy specific requirements of the EEP in order to qualify for a subsidy under this program. These requirements included, among other things: a) that the United States exporter be unaffiliated with the company it was selling the grain to, and b) that the United States exporter's sales price for the grain meet a minimum acceptable price as set by the USDA. The USDA sets the minimum acceptable price to insure that the U.S. exporter's sales price does not undercut the existing market price for the grain in the targeted country.

The Conspiracy

6. From in or about July 1991, through in or about March 1993, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, and others known and

unknown, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree together and with each other to commit certain offenses against the United States, to wit, violations of Title 15, United States Code, Section 714m(a), and Title 18, United States Code, Section 1343.

Objects of the Conspiracy

7. It was a part and object of the conspiracy that MENACHEM PRI-HAR, the defendant, and others known and unknown, unlawfully, wilfully, and knowingly would and did make statements knowing them to be false for the purpose of influencing the action of the CCC, and for the purpose of obtaining for himself and others money, property and a thing of value, to wit, in excess of $4 million, under an Act applicable to the CCC, to wit, the Agricultural Trade Act of 1978, as amended by the Food Agricultural Conservation and Trade Act of 1990, codified in Title 7, United States Code, Section 5651, in violation of Title 15, United States Code, Section 714m.

8. It was a further part and object of the conspiracy that MENACHEM PRI-HAR, the defendant, and others known and unknown, unlawfully, wilfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, and sounds for the purpose of executing such scheme and artifice, to wit, communications relating to applications for subsidies under the EEP, as administered by the CCC, an agency of the USDA, in violation of Title 18, United States Code, Section 1343.

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Means and Methods of the Conspiracy

9. It was a means and method of the conspiracy that between October 1991 and April 1992, RRC, at the direction of MENACHEM PRI-HAR, the defendant, applied for and was granted eight separate subsidies under the EEP. RRC, at the direction of MENACHEM PRI-HAR, made material false statements to the CCC both orally and in its subsidy applications in order (1) to obtain the subsidies, and (2) to recover performance bonds which RRC had been required to submit to the CCC under the EEP. These misrepresentations included:

(a) that RRC was unaffiliated with Olges when in fact MENACHEM PRI-HAR knew that he controlled the operations of both RRC and Olges;

(b) that RRC was selling barley to Olges, when in fact MENACHEM PRI-HAR knew that RRC was not making such sales to Olges; and

(c) that RRC was exporting barley to Israel at a specified price which would be acceptable to the USDA, when in fact MENACHEM PRI-HAR knew that RRC was exporting the barley to Israel at a much lower price — a price at which RRC would have been ineligible to obtain subsidies from the USDA.

10. It was also a means and method of the conspiracy that RRC, at the direction of MENACHEM PRI-HAR, submitted additional false documents to the USDA in order to obtain the subsidies under the EEP and to recover RRC's performance bonds. Among these documents were the following:

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(a) false entry certificates representing that Olges had received the barley for which the subsidies were awarded, when in fact the barley never went to Olges, but instead went to other companies in Israel;

(b) a fictitious invoice purportedly billing Olges for a barley shipment, when in fact Olges never received the invoice or made any payments on it; and

(c) a false document purporting to be a schedule of payments from Olges to RRC for the barley shipments, when in fact no such payments ever occurred.

OVERT ACTS

11. In furtherance of said conspiracy and to effect the illegal objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a. On the dates specified below, RRC, under the direction of MENACHEM PRI-HAR, sent by facsimile transmission ("fax") to the USDA applications for subsidies, each of which contained false information:

October 22, 1991 (two applications)

October 31, 1991

February 10, 1992

February 12, 1992

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March 26, 1992

April 8, 1992 (two applications)

b. On or about January 29, 1992, MENACHEM PRI-HAR sent a letter to the USDA enclosing a fictitious document purporting to be an invoice from RRC to Olges for the sale of barley.

(Title 18, United States Code, Section 371.)

COUNTS TWO THROUGH NINE

The Grand Jury further charges:

12. The allegations contained in paragraphs 1 through 5, 9 and 10 of Count One of this Indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

13. On or about the dates set forth below, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, unlawfully, wilfully, and knowingly did make statements knowing them to be false, for the purpose of influencing the action of the CCC, and for the purpose of obtaining for himself and others money, property and a thing of value, to wit, in excess of $4 million, under the Agricultural Trade Act of 1978, as amended by the Food Agricultural Conservation and Trade Act of 1990, codified in Title 7, United States Code, Section 5651, to wit, RRC, at the direction of MENACHEM PRI-HAR, submitted applications for subsidies to the CCC falsely representing the identity of the barley purchaser, the relationship between RRC and the claimed barley purchaser, and the prices at which the barley was being sold.

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COUNT	APPROXIMATE DATE OF APPLICATION	USDA APPROVAL NUMBER
2	October 22, 1991	GSM-504-35-B-49c
3	October 22, 1991	GSM-504-35-B-50c
4	October 31, 1991	GSM-504-35-B-51c
5	February 10, 1992	GSM-504-35-B-54CA
6	February 12, 1992	GSM-504-35-B-56CA
7	March 26, 1992	GSM-504-35-B-57CA
8	April 8, 1992	GSM-504-35-B-58CA
9	April 8, 1992	GSM-504-35-B-59CA

(Title 15, United States Code, Section 714m(a), and Title 18, United States Code, Section 2.)

WHEAT FRAUD

COUNT TEN

The Grand Jury further charges:

14. The allegations contained in paragraphs 1 through 3 of Count One of this Indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

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15. From in or about May 1992, through and including March 1993, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, and others known and unknown, did unlawfully, wilfully, and knowingly combine, conspire, confederate and agree together and with each other to commit certain offenses against the United States, to wit, violations of Title 18, United States Code, Sections 1343 and 1344.

Objects of the Conspiracy

16. It was a part and object of the conspiracy that MENACHEM PRI-HAR, the defendant, and others known and unknown, unlawfully, wilfully, and knowingly would and did execute and attempt to execute a scheme and artifice to obtain moneys, funds, credits, assets, securities and other property owned by and under the custody and control of financial institutions, to wit, Standard Chartered Bank, New York Branch ("Standard Chartered") and Banque Nationale de Paris ("BNP"), New York Branch, by means of false and fraudulent pretenses, representations and promises, to wit, MENACHEM PRI-HAR, the defendant, acting on behalf of RRC and Olges, would and did obtain loans issued by Standard Chartered and BNP-New York for the purchase of wheat, by making material misstatements, namely, significantly overstating the price of purchasing the wheat, and materially misrepresenting the financial status of RRC, in violation of Title 18, United States Code, Section 1344.

17. It was a further object of the conspiracy that MENACHEM PRI-HAR, the defendant, and others known and unknown, unlawfully, wilfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent

pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire communication in foreign commerce, writings, signs, signals, and sounds for the purpose of executing such scheme and artifice, to wit, communications relating to obtaining funds by drawing down on loans issued by BNP- Geneva, Switzerland; Dresdner Bank, Germany, ("Dresdner"); and United Overseas Bank, Switzerland, ("UOB"), in violation of Title 18, United States Code, Section 1343.

Means and Methods of the Conspiracy

18. In or about May 1992, Olges was awarded a contract by the Government of Israel to purchase, store and maintain a supply of wheat in Israel under the Israeli Emergency Wheat Program. In or about May 1992, MENACHEM PRI-HAR, acting on behalf of RRC, entered into an agreement with Olges to obtain the necessary bank financing to purchase the wheat.

19. It was a means and method of the conspiracy that in or about June and July 1992, MENACHEM PRI-HAR, acting on behalf of RRC, would and did obtain loans totalling approximately in excess of $35 million from Standard Chartered, BNP-New York, BNP-Geneva, Dresdner, and UOB (collectively "the Financing Banks"), which money was to be used to purchase wheat and wheat futures contracts. In each case, the Financing Banks were to receive a security interest in the wheat purchased with the money loaned by the respective banks.

20. It was also a means and method of the conspiracy that at the direction of MENACHEM PRI-HAR, documents entitled "Certificate of Price" were created that significantly overstated the price of the wheat being purchased by Olges. At the further

direction of PRI-HAR, these documents were then transmitted to Union Bank of Israel ("Union Bank"), the trustee bank acting on behalf of the Financing Banks. Union Bank, in turn, relied on the false price information included in these documents in permitting Olges to draw down on the funds provided by the Financing Banks. As a result of these actions, the wheat that secured the Financing Banks' loans had in fact been purchased at a substantially lower price than the amount of money that each bank loaned, and therefore a substantial portion of the money loaned for the purchase of wheat that was to serve as security for loans was not used by RRC or Olges for that purpose. Moreover, the vast majority of the money loaned for purchases of futures contracts was not used by RRC or Olges for that purpose.

21. It was also a means and method of the conspiracy that RRC, at the direction of MENACHEM PRI-HAR, provided financial statements of RRC to the Financing Banks that materially misrepresented the financial status of RRC.

OVERT ACTS

22. In furtherance of said conspiracy and to effect the illegal object thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a. In or about June and July 1992, RRC, at the direction of MENACHEM PRI-HAR, faxed documents entitled "Certificate of Price" to Olges in Israel, which falsely represented the price of the wheat purchased by Olges with money loaned by the Financing Banks.

b. On or about July 24, 1992, RRC, at the direction of

MENACHEM PRI-HAR, entered into a contract with Standard Chartered in which Standard Chartered agreed to issue a $12 million loan for the purchase of wheat in connection with the Israeli Emergency Wheat Program.

(Title 18, United States Code, Section 371.)

COUNTS ELEVEN AND TWELVE

The Grand Jury further charges:

23. The allegations contained in paragraphs 1 through 3 of Count One, and 18 through 21 of Count Ten, of this Indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

24. In or about July 1992, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, unlawfully, wilfully, and knowingly did execute and attempt to execute a scheme and artifice to obtain money, funds, credits, assets, securities and other property owned by and under the custody and control of financial institutions, in the amounts specified below, by means of false and fraudulent pretenses, representations and promises, to wit, MENACHEM PRI-HAR obtained funds from the following banks on behalf of RRC, which money was to be used by Olges to purchase the wheat, by making material misstatements, namely, significantly overstating the price of purchasing the wheat, and materially misrepresenting the financial status of RRC:

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COUNT	BANK	AMOUNT
11	STANDARD CHARTERED BANK	$11,988,000
12	BNP — NEW YORK	$2,000,000

(Title 18, United States Code, Sections 1344 and 2.)

DRESDNER BANK FRAUD

COUNT THIRTEEN

The Grand Jury further charges:

Introduction

25. The allegations contained in paragraphs 1 through 3 of Count One, and 18 through 21 of Count Ten, of this Indictment, are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

26. In late 1992, Standard Chartered and BNP-Geneva brought a legal action in an Israeli court to have a liquidator appointed to take over the administration of the Israeli Emergency Wheat Program from Olges. In December 1992, the Israeli court appointed a liquidator to administer the Program.

The Conspiracy

27. From in or about December 1992 through March 1993, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, and others known and

unknown, did unlawfully, wilfully, and knowingly combine, conspire, confederate and agree together and with each other to commit certain offenses against the United States, to wit, a violation of Title 18, United States Code, Section 1343.

28. It was a part and object of the conspiracy that MENACHEM PRI-HAR, the defendant, and others known and unknown, unlawfully, wilfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire communication in foreign commerce, writings, signs, signals, and sounds for the purpose of executing such scheme and artifice, to wit, communications made to PRI-HAR for submission to Dresdner Bank, located in Germany, relating to (a) an application for financing for a shipment of tapioca, and (b) an attempt to regain control of the administration of the Israeli Emergency Wheat Program which had been placed under the control of a court-appointed liquidator, in violation of Title 18, United States Code, Section 1343.

Means and Methods of the Conspiracy

29. It was a means and method of the conspiracy that between December 1992 and March 1993, MENACHEM PRI-HAR, the defendant, sought to convince Dresdner Bank to turn over control of the Israeli Emergency Wheat Program to RRC, rather than have it under the control of a court-appointed liquidator in Israel. In or about the same time, MENACHEM PRI-HAR, on behalf of RRC, applied for financing from Dresdner Bank for the sale of tapioca to Bulgaria. In support of these applications, MENACHEM PRI-HAR sought to

convince Dresdner Bank that RRC could sell the Israeli wheat at a higher price that the court-appointed liquidator, and provide assurance regarding the status of Dresdner Bank's outstanding wheat loans. To accomplish these goals, MENACHEM PRI-HAR fraudulently informed Dresdner Bank that RRC had made sales of wheat at a specified price in Israel, when PRI-HAR knew that RRC had not sold any wheat in Israel.

30. It was a further means and method of the conspiracy that in or about February 1993, in response to a request from a representative of Dresdner Bank for information regarding the price at which RRC had sold the wheat, MENACHEM PRI-HAR, the defendant, directed RRC employees to create fictitious documents, including invoices and contracts, to reflect fictitious sales of wheat. Certain of these documents were sent by fax from RRC's New York office to PRI-HAR in Hong Kong, and Geneva, Switzerland. PRI-HAR, in turn, submitted certain of these fictitious documents to Dresdner Bank.

OVERT ACTS

31. In furtherance of said conspiracy and to effect the illegal object thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a. On or about February 5, 1993, at the direction of MENACHEM PRI-HAR, the defendant, an RRC employee faxed a fictitious contract and invoice, purporting to relate to the sale of wheat, to PRI-HAR in Hong Kong.

b. On or about February 8, 1993, at the direction of MENACHEM PRI-HAR, the defendant, an RRC employee faxed bank statements, purportedly reflecting payments received by RRC for the sale of wheat, to PRI-HAR in Geneva, Switzerland.

c. On or about February 9, 1993, at the direction of MENACHEM PRI-HAR, the defendant, an RRC employee faxed fictitious invoices, purporting to relate to the sale of wheat, to PRI-HAR in Geneva, Switzerland.

d. On or about February 10, 1993, MENACHEM PRI-HAR, the defendant, who was in Geneva, Switzerland, had a telephone conversation with RRC employees in which PRI-HAR requested that additional fictitious documents be prepared for submission to Dresdner Bank.

(Title 18, United States Code, Section 371.)

COUNTS FOURTEEN THROUGH SEVENTEEN

The Grand Jury further charges:

32. The allegations contained in paragraphs 1 through 3 of Count One, and 29 and 30 of Count Thirteen, of this Indictment are hereby repeated, realleged and incorporated by as if fully set forth herein.

33. On or about the dates specified below, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, unlawfully, wilfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire communication in foreign commerce, writings, signs, signals, and sounds for the purpose of executing such scheme and artifice, to wit, the following communications between RRC's New York Office and MENACHEM PRI-HAR, who was at the

following locations, relating to (a) an application for financing for a shipment of tapioca, and (b) an attempt to regain control of the administration of the Israeli Emergency Wheat Program which had been placed under the control of a court-appointed liquidator:

COUNT	DATE	LOCATION	COMMUNICATION
14	February 5, 1993	HONG KONG	FAX
15	February 8, 1993	GENEVA, SWITZERLAND	FAX
16	February 9, 1993	GENEVA, SWITZERLAND	FAX
17	February 10, 1993	GENEVA, SWITZERLAND	TELEPHONE CALL

(Title 18, United States Code, Section 1343.)

BNP MARGIN LOAN FRAUD

COUNT EIGHTEEN

The Grand Jury further charges:

34. The allegations contained in paragraphs 1 through 3 of Count One of this Indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

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35. From in or about January 1992, up to and including March 1993, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, and others known and unknown, did unlawfully, wilfully, and knowingly combine, conspire, confederate and agree together and with each other to commit certain offenses against the United States, to wit, violations of Title 18, United States Code, Section 1344.

Object of the Conspiracy

36. It was a part and object of the conspiracy that MENACHEM PRI-HAR, the defendant, and others known and unknown, unlawfully, wilfully, and knowingly would and did execute and attempt to execute a scheme and artifice to obtain moneys, funds, credits, assets, securities and other property owned by and under the custody and control of a financial institution, to wit, BNP-New York, by means of false and fraudulent pretenses, representations and promises, to wit, RRC, at the dirction of MENACHEM PRI-HAR: (i) would and did obtain a $1.5 million loan from BNP-New York by (a) falsely representing that the money would be used to purchase futures contracts in connection with RRC commodities shipments to be financed by BNP, when, in fact, as MENACHEM PRI-HAR knew, the money would be used for other purposes, and (b) materially misrepresenting the financial status of RRC; and (ii) would and did repeatedly induce BNP to extend the term of the loan by falsely representing that the $1.5 million had in fact been used to purchase futures contracts in connection with RRC commodities shipments to be financed by BNP-New York, when, in fact, as MENACHEM PRI-HAR knew, the money had been used for other purposes, in violation of Title 18, United States Code, Section 1344.

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Means and Methods of the Conspiracy

37. In or abouth January 1992, RRC entered into a credit agreement with BNP-New York which stated in substance that under specified circumstances BNP-New York would finance up to $8 million in shipments of commodities sold by RRC to entities in foreign countries. The agreement further stated in substance that, in addition, BNP-New York would provide up to $1.5 million for use by RRC to purchase futures contracts in connection with the commodities shipments being financed by BNP-New York.

38. It was a means and method of the conspiracy that in or about February, 1992, RRC obtained $1.5 million pursuant to the aforementioned credit agreement from BNP-New York purportedly for the purpose of purchasing futures contracts. In fact, this money was not used by RRC for the purchase of futures contracts.

39. It was also a means and method of the conspiracy that between February 1992 and October 1992, at the direction of MENACHEM PRI-HAR, RRC submitted documents to BNP-New York which were to be used to show that RRC had purchased futures contracts with the $1.5 million loaned by BNP-New York in accordance with the credit agreement, when, in fact, RRC had made no such purchases.

40. It was also a means and method of the conspiracy that RRC, at the direction of MENACHEM PRI-HAR, provided financial statements of RRC to BNP-New York that materially misrepresented the financial status of RRC.

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OVERT ACTS

41. In furtherance of said conspiracy and to effect the illegal object thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

(a) In or about February 1992, RRC, at the direction of MENACHEM PRI-HAR, submitted to BMP-New York a fictitious list of contracts that RRC had purportedly entered into.

(b) In or about May 1992, RRC, at the direction of MENACHEM PRI-HAR, submitted to BMP-New York a fictitious list of contracts that RRC had purportedly entered into.

(c) In or about July 1992, RRC, at the direction of MENACHEM PRI-HAR, showed a representative of BNP-New York two fictitious contracts that RRC had purportedly entered into.

(Title 18, United States Code, Section 371.)

COUNT NINETEEN

The Grand Jury further charges:

42. The allegations contained in paragraphs 1 through 3 of Count One, and 37 through 40 of Count Eighteen, of this indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

43. From in or about January 1992, up to and including

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March 1993, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, unlawfully, wilfully, and knowingly did execute and attempt to execute a scheme and artifice to obtain moneys, funds, credits, assets, securities and other property owned by and under the custody and control of a financial institution, to wit, BNP-New York, by means of false and fraudulent pretenses, representations and promises, to wit, MENACHEM PRI-HAR, acting on behalf of RRC: (i) obtained a $1.5 million loan from BNP-New York on behalf of RRC by (a) falsely representing that the money would be used to purchase futures contracts in connection with RRC commodities shipments, when, in fact, as MENACHEM PRI-HAR knew, the money would be used for other purposes, and (b) materially misrepresenting the financial status of RRC; and (ii) repeatedly induced BNP-New York to extend the term of the loan by falsely representing that the $1.5 million had in fact, been used to purchase futures contracts in connection with RRC commodities shipments, when, in fact, as MENACHEM PRI-HAR knew, the money had been used for other purposes.

(Title 18, United States Code, Section 1344 and 2.)

RAM STEEL FRAUD

COUNT TWENTY

The Grand Jury further charges:

44. The allegations contained in paragraphs 1 through 3 of Count One of this Indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

45. From in or about December 1991 through December

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1992, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, and others known and unknown, did unlawfully, wilfully, and knowingly combine, conspire, confederate and agree together and with each other to commit certain offenses against the United States, to wit, violations of Title 18, United States Code, Section 1344.

Object of the Conspiracy

46. It was a part and object of the conspiracy that MENACHEM PRI-HAR, the defendant, and others known and unknown, unlawfully, wilfully, and knowingly would and did execute and attempt to execute a scheme and artifice to obtain moneys, funds, credits, assets, securities and other property owned by and under the custody and control of financial institutions, to wit, BNP-New York and ABN-AMBRO Bank, by means of false and fraudulent pretenses, representations and promises, to wit, RRC, at the direction of MENACHEM PRI-HAR, obtained (i) in excess of $7 million in loans from BNP-New York; and (ii) extensions of loans issued by ABN-AMBRO in excess of $10 million. In each instance, the loans were to be secured by certain steel billets. PRI-HAR falsely represented that Union Bank Trust Company Limited ("UBT"), a trustee bank in Israel, maintained control over these steel billets by virtue of the bills of lading for these steel billets which UBT held. In fact, PRI-HAR well knew that the purchaser of the steel billets, Ram Metals & Building Industries, Ltd., ("Ram") located in Israel, had been able to obtain possession and control of the steel billets notwithstanding the fact that UBT had the bills of lading. Moreover, RRC, at the direction of PRI-HAR, materially misrepresented the financial status of RRC.

Appendix A

Means and Methods of the Conspiracy

47. From in or about November 1990 through August 1992, RRC, at the direction of MENACHEM PRI-HAR, the defendant, agreed to provide financing for the purchase by Ram of steel billets from companies located in Poland. RRC obtained this financing from banks, including BNP-Geneva, Dresdner Bank, and ABN-AMRO Bank. In each case, the loans were to be secured by the steel billets being sold by the Polish companies to Ram. At or about the time the loans were made, the banks received a copy of a trust agreement between RRC and UBT. PRI-HAR represented to the banks that, pursuant to that agreement (the "UBT Trust Agreement"), the bills of lading for the steel were being held in trust by UBT, and the steel would not be released to Ram until Ram paid RRC for the steel.

48. In or about March, 1992, RRC, at the direction of PRI-HAR, obtained loans in excess of $7 million from BNP-New York to refinance the BNP- Geneva and Dresdner Bank loans referred to above. In or about that time, RRC, at the direction of PRI-HAR, also obtained an extension of the ABN-AMRO loan referred to above, in a total amount in excess of $10 million.

49. Prior to obtaining the refinancing and extensions described in paragraphs 46 through 48 above, BNP-New York and ABN-AMRO Bank were informed by PRI-HAR and UBT that the steel was being stored at the port in Israel in Ram's name, and that UBT maintained control over the steel billets by virtue of its possession of the bills of lading. Contrary to these representations, however, PRI-HAR was aware that the bills of lading possessed by UBT did not in fact provide UBT with control of the steel billets, that the steel billets had been removed from the port to a warehouse under Ram's control without

payment by Ram as required under the UBT Trust Agreement, and that some of these steel billets had been subsequently removed from that warehouse.

50. It was also a means and method of the conspiracy that RRC, at the direction of MENACHEM PRI-HAR, provided financial statements of RRC to ABN-AMRO and BNP-New York that materially misrepresented the financial status of RRC.

OVERT ACTS

51. In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

(a) On or about February 27, 1992, MENACHEM PRI-HAR, the defendant, had a conversation with an officer of BNP New-York regarding the status and location of steel billets in Israel.

(b) On or about March 3, 1992, RRC, at the direction of MENACHEM PRI-HAR, the defendant, obtained approximately $2 million in refinancing from BNP-New York in connection with shipments of steel billets from Poland to Israel.

(c) On or about March 17, 1992, RRC, at the direction of MENACHEM PRI-HAR, the defendant, obtained approximately $4 million in refinancing from BNP-New York in connection with shipments of steel billets from Poland to Israel.

(d) On or about March 27, 1992, RRC, at the

direction of MENACHEM PRI-HAR, the defendant, obtained extensions of loans totalling approximately $10 million made by ABN-AMRO in connection with shipments of steel billets from Poland to Israel.

(Title 18, United States Code, Section 371).

COUNT TWENTY-ONE

The Grand Jury further charges:

52. The allegations contained in paragraphs 1 through 3 of Count One, and 47 through 50 of Count Twenty, of this Indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

53. From in or about December 1991 through December 1992, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, unlawfully, wilfully, and knowingly did execute and attempt to execute a scheme and artifice to obtain moneys, funds, credits, assets, securities and other property owned by and under the custody and control of a financial institution, to wit, BNP-New York, by means of false and fraudulent pretenses, representations and promises, to wit, MENACHEM PRI-HAR, obtained in excess of $7 million in loans from BNP-New York pursuant to an agreement (a) by falsely representing that the loans were secured by certain steel billets under the control of UBT, a trustee bank in Israel, when PRI-HAR well knew that the steel billets were not under UBT's control, and (b) by materially misrepresenting the financial status of RRC.

(Title 18, United States Code, Section 1344 and 2).

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COUNT TWENTY-TWO

The Grand Jury further charges:

54. The allegations contained in paragraphs 1 through 3 of Count One, and 47 through 50 of Count Twenty, of this Indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

55. From in or about December 1991 through December 1992, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, unlawfully, wilfully, and knowingly did execute and attempt to execute a scheme and artifice to obtain moneys, funds, credits, assets, securities and other property owned by and under the custody and control of a financial institution, to wit, ABN-AMRO Bank, by means of false and fraudulent pretenses, representations and promises, to wit, MENACHEM PRI-HAR, obtained an extension of in excess of $10 million in loans from ABN-AMRO pursuant to an agreement (a) by falsely representing that the loans were secured by certain steel billets under the control of UBT, a trustee bank in Israel, when PRI-HAR well knew that the steel billets were not under UBT's control, and (b) by materially misrepresenting the financial status of RRC.

(Title 18, United States Code, Section 1344 and 2).

CITIBANK FRAUD

COUNT TWENTY-THREE

The Grand Jury further charges:

56. The allegations contained in paragraphs 1 through 3 of Count One of this Indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

57. Between in or about January 1987 and April 1987, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, unlawfully, wilfully, and knowingly did make or cause to be made false statements for the purpose of influencing the actions of Citibank, N.A., a bank whose deposits were then insured by the Federal Deposit Insurance Corporation, upon an application and loan, to wit, MENCHEM PRI-HAR, the defendant, submitted, in connection with an application for a $1 million line of credit from Citibank, N.A., a personal financial statement which falsely represented that PRI-HAR owned certain specified properties, when in fact PRI-HAR knew that he was not the owner of such properties.

(Title 18, United States Code, Section 1014 and 2).

BANK OF TOKYO FRAUD

COUNT TWENTY-FOUR

The Grand Jury further charges:

58. The allegations contained in paragraph 1 through 3 of Count One of this indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

59. Between in or about March 1988 and May 1988, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, unlawfully, wilfully, and knowingly did make a false statement for the purpose of influencing the

actions of Bank of Tokyo, Ltd., an agency of a foreign bank, upon an application and loan, to wit, MENACHEM PRI-HAR, the defendant, submitted, in connection with an application for a $17 million loan from Bank of Tokyo, Ltd., a financial statement which falsely represented that PRI-HAR owned certain specified properties, when in fact PRI-HAR knew that he was not the owner of such properties.

(Title 18, United States Code, Section 1014 and 2).

s/ Andrew Alloy
DEPUTY FOREPERSON

s/ Mary Jo White
MARY JO WHITE
United States Attorney

APPENDIX B — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED FEBRUARY 21, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case Number: *SSSSS 93 CR 00278 01 (JES)*

UNITED STATES OF AMERICA

V.

MENACHEM PRI-HAR

(Name of Defendant)

Don Harwood Esq.
Defendant's Attorney

AUSA John McCormick

***AMENDED* JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After November 1, 1987)

THE DEFENDANT:

☒ was found guilty on count(s) *SSSSS 1 through SSSSS 24* after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
8 USC 371	*Conspiracy to Defraud the U.S. Dept. of Agriculture*		*SSSSS 1*
8 USC 714m(a)	*Defrauding the U.S. Dept. of Agriculture*		*SSSSS 2 through 9*

Appendix B

(Cont'd)

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
8 USC 371	*Conspiracy to Commit Bank Fraud*		*SSSSS 10, 18, 20*
8 USC 1344 and 2	*Bank Fraud*		*SSSSS 11, 12, 19, 21*
8 USC 371	*Conspiracy to Commit Wire Fraud*		*SSSSS 13*
8 USC 1343	*Wire Fraud*		*SSSSS 14 through 17*
8 USC 1014 and 2	*False Statements on Loan or Credit Application*		*SSSSS 23 and 24*

The defendant is sentenced as provided in pages 2 through *6* of this judgment. The sentence is imposed pursuant to to the Sentencing Reform Act of 1984.

☒ Count(s) *of the underlying Ind's except SS10* (are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of *$50.00*, for count(s) *SSSSS 1 through SSSSS 24 inclusive for a total assessment of $1,200.00*, which shall be due ☒ immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Appendix B

Defendant's Soc. Sec. No.: *093-68-3602*

Defendant's Date of Birth: *June 10, 1954*

Defendant's Mailing Address:
7 Red Rock Lane
Oakdale, N.Y. 11769

Defendant's Residence Address:
SAME

July 20, 1994
Date of Imposition of Sentence

s/ John E. Sprizzo
Signature of Judicial Office

HON. JOHN E. SPRIZZO, U.S.D.J.
Name & Title of Judicial Officer

February 10, 1995
Date

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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of _____.

Counts 1 through 10 (inclusive)-SIXTY (60) MONTHS to run concurrent

Appendix B

Counts 13 through 18 (inclusive)-SIXTY (60) MONTHS to run concurrent

Count 20-SIXTY (60) MONTHS

Counts 11, 12, 19, 21, 22-ONE HUNDRED AND SIXTY EIGHT (168) MONTHS to run concurrent

Counts 23 and 24-TWENTY FOUR (24) MONTHS to run concurrent

All sentences on all counts are to run concurrent to all other counts on which sentence has been imposed.

☒ The defendant is remanded to the custody of the United States marshal.

* * *

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SUPERVISED RELEASE

Upon release from imprisonment, the defendsant shall be on supervised release for a term of *FIVE (5) YEARS concurrent on all counts.*

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant

pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall not possess a firearm or destructive device.

The Defendant shall make restitution as detailed on page 5 of this judgment

The Defendant shall pay the fine as detailed on page 4 of this judgment

The Defendant shall provide all financial information as requested by the Probation Dept.

The Defendant shall cooperate with the banks concerning any civil lawsuits

* * *

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FINE

The defendant shall pay a fine of $*1,000,000.00*. The fine includes any costs of incarceration and/or supervision.

☒ This amount is the total of the fines imposed on individual counts, as follows:

Count 11: ONE MILLION ($1,000,000.00) DOLLARS

* * *

Appendix B

This fine plus any interest required shall be paid:

☒ in installments according to the following schedule of payments:

The Probation Dept. shall determine a schedule for payments, and shall make certain that the defendant is making a good faith effort to pay this fine over the course of the fourteen years of imprisonment and the five years of supervised release imposed upon him.

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RESTITUTION AND FORFEITURE

RESTITUTION

☒ The defendant shall make restitution to the following persons

Name of Payee	Amount of Restitution
Standard Chartered Bank	
BNP-New York	
BNP-Geneva	
United Overseas Bank	
ABN-AMRO Bank	
Citibank	
Bank of Tokyo	*TOTAL: THIRTY NINE MILLION ($39,000,000.00) Dollars*

Appendix B

Restitution shall be paid:

☒ in installments according to the follwing schedule of payments:

According to a schedule of payments to be determined by the Probation Dept. The Probation Dept. is to make certain that the defendant is making a good faith effort to make restitution over the course of the fourteen years of imprisonment and five years of supervised release imposed upon him

* * *

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STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: *34*

Criminal History Category: *I*

Imprisonment Range: *151* to *188* months

Supervised Release Range: *3* to *5* years

Fine Range: $*25,000.00* to $*1,000,000.00*

Appendix B

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.
Restitution: $*36,000,000,00*

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

* * *

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED JANUARY 3, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

94-1305

UNITED STATES OF AMERICA,

Appellee,

v.

MENACHEM PRI-HAR,

Defendant-Appellant.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of January, one thousand nine hundred and ninety-four.

PRESENT: HONORABLE JON O. NEWMAN,
Chief Judge.
HONORABLE J. EDWARD LUMBARD,
HONORABLE THOMAS J. MESKILL,
Circuit Judges.

ORDER

Appeal from the United States District Court for the Southern District of New York (John E. Sprizzo, Judge).

Appendix C

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Defendant-Appellant Menachem Pri-har appeals the judgment of the District Court for the Southern District of New York (John E. Sprizzo, Judge) convicting him, following a jury trial, on all twenty-four counts of the indictment, which charged him with conspiracy, in violation of 18 U.S.C. § 371; wire fraud and bank fraud, in violation of 18 U.S.C. §§ 1343 and 1344; making false statements to the United States Department of Agriculture ("USDA"), in violation of 15 U.S.C. § 714(m); and making false statements in a bank loan application, in violation of 18 U.S.C. § 1014. Pri-har also challenges the sentence imposing 168 months' imprisonment, to be followed by five years' supervised release, and ordering him to pay $39 million in restitution, a $1 million fine, and a $1,200 mandatory assessment.

1. On appeal, Pri-har challenges the sufficiency of the evidence to support conviction on each count of the indictment. Pri-har was charged for his involvement in seven different fraud schemes, the facts of which are complicated and need not be stated here. We have reviewed the record and found, after drawing all reasonable inferences and resolving issues of credibility in favor of the verdict, *see United States v. Amato*, 15 F.3d 230, 235 (2d Cir. 1994), that the evidence was sufficient to uphold Pri-har's conviction on all counts.

2. Pri-har next contends that the Court improperly instructed the jury that the Government did not have to prove that he knew that he was breaking a particular law, but only that he was aware of the general unlawfulness of his actions. Because Pri-har did not object to this charge, he has waived his claim unless the charge constituted plain error. *United States v. Smith,* 918 F.2d 1032, 1038 (2d Cir. 1990), *cert. denied,* 498 U.S. 1125 (1991). We find no such error here. The Court properly instructed the jury that it could convict only if it found that Pri-har acted intentionally and deliberately with the specific intent to defraud in carrying out the fraudulent scheme. Unlike the structuring statute at issue in *Ratzlaf v. United States,* 114 S. Ct. 655 (1994), the fraud crimes charged in this case do not require a showing that the defendant specifically intended to violate a particular law. *See, e.g., United States v. Carpenter,* 791 F.2d 1014, 1035 (2d Cir. 1986), *aff'd,* 484 U.S. 19 (1987).

3. Pri-har also contests various evidentiary rulings. In particular, he challenges the Court's admission of certain evidence proffered by the Government and exclusion of allegedly exculpatory evidence proffered by Pri-har's counsel. We find no abuse of discretion. In any event, none of its rulings so unfairly prejudiced Pri-har as to warrant a new trial.

4. There is no merit to Pri-har's contention that the Court unfairly conducted the questioning of witnesses. The Court questioned both Government and defense witnesses during the trial, and instructed the jury that its verdict should be based upon the evidence alone, that nothing the Court said to witnesses or to counsel should affect the jury's decision, and that the Court did not have any opinion as to the facts or what the verdict should be.

5. Pri-har also claims that trial counsel was constitutionally ineffective in failing to raise certain defenses in his summation, even though counsel had developed a number of these defenses at trial. But, far from being ineffective, counsel conducted the defense competently, notwithstanding the overwhelming evidence of Pri-har's guilt. Moreover, counsel raised many of the arguments Pri-har claims were omitted, and counsel's failure to raise other arguments amounted to a strategic decision.

6. Finally, Pri-har raises a number of challenges to his sentence. Specifically, he claims that the Court erred in calculating the loss from some of his fraud schemes and in enhancing his sentence four levels for being an organizer or leader of five persons, two levels for obstruction of justice, and four levels for personally deriving more than $1 million in gross receipts from an offense affecting a financial institution. Each of the challenged sentencing rulings is supported by the facts and involves a proper application of the Guidelines. Pri-har also challenges the Court's imposition of $1 million in fines and $39 million in restitution on the ground that there was insufficient evidence of his ability to pay these sums. This claim is meritless, particularly because the Probation Department and Court found that Pri-har was attempting to conceal his assets.

s/ Jon O. Newman
Chief Judge.

s/ J. Edward Lumbard

s/ Thomas J. Meskill
Circuit Judges.